-159483

LAW ASSOCIATION
PHILADEL

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 261.

JOSEPH L. WHITE, PLAINTIFF IN ERROR,

vs.

MARTHA ANN VAN HORN, MARY ANN BOLING AND
HER HUSBAND, W. W. BOLING, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF TEXAS.

FILED AUGUST 12, 1891.

(14,796.)

(14,796.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 261.

JOSEPH L. WHITE, PLAINTIFF IN ERROR,

vs.

MARTHA ANN VAN HORN, MARY ANN BOLING AND HER HUSBAND, W. W. BOLING, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print.
Caption	1	1
Original petition	1	1
First amended original answer of defendant Joseph L. White	3	2
Plea of W. R. Baker to jurisdiction	10	7
Affidavit of forgery	10	7
First supplemental petition	12	8
First supplemental answer of defendant Joseph L. White	13	9
Answer of defendants Hill and Ewing	14	10
Answer of George G. White	16	11
Demurrer, &c., of Henry Brashear	16	11
Charge of the court	17	12
Judgment	21	15
Motion for new trial	24½	17
Order overruling motion for new trial	29	20
Agreement that record and bills of exceptions may be made up and filed after adjournment	29	21
Bill of exceptions of Ewing *et al*	30	21

Judd & Detweiler, Printers, Washington, D. C., August 29, 1894.

	Original.	Print.
Bill of exceptions of Joseph L. White	31	22
Land certificate	31	22
Testimony of Mary Ann Boling	32	22
W. H. Miller	37	26
Martha Ann Van Horn	38	26
Thomas Rouse	41	28
W. Boom Van Horn	42	29
R. M. Hall	43	30
Transfer of certificate	44	31
Military voucher or certificate	47	35
Testimony of Joseph L. White and another	48	33
Transfer from Chism to Robinson	49	33
Testimony of W. R. Baker	50	34
Power of attorney from Robinson to Baker	51	35
Deed from Robinson to De Cordova	55	37
Deed from De Cordova to Baker	59	40
Testimony of W. R. Baker	63	43
Chain of title	67	46
Testimony of R. M. Hall	68	46
Statement of certificates of first class	70	47
Military vouchers and certificates	72	49
Land certificates	73	49
Testimony of Augustin Moreman	75	51
Requests to charge and exceptions	79	54
Charge given at request of plaintiffs and exceptions	83	56
Charge of the court and exceptions	86	57
Judge's certificate	88	59
Assignment of errors	88	59
Petition for writ of error	95	64
Writ of error	97	64
Bond on writ of error	98	65
Citation	100	66
Proof of service of citation	101	67
Clerk's certificate	103	68

1 In the Circuit Court of the United States, Fifth Circuit, Northern District of Texas, at Waco, Texas, April Term, A. D. 1891, Hon. A. P. McCormick, U. S. District Judge, Presiding:

Be it remembered that in a certain cause or action at law in the said circuit court, wherein M. A. Van Horn *et al.* are plaintiffs and Joseph L. White defendant, and which said cause was finally tried at a term of said court begun and holden in the city of Waco on the second Monday of April, A. D. 1891, the following proceedings were had and the following papers filed, to wit:

Plaintiffs' Original Petition.

In the Circuit Court of the U. S. for the Northern District of Texas, at Waco.

M. A. VAN HORN *et al.*
vs.
JOSEPH L. WHITE.

To the hon. judges of said court:

Martha Ann Van Horn (widow), Mary Ann Boling, joined by her husband, Wm. W. Boling, and Elizabeth Evans, joined by her husband, David B. Evans, plaintiffs, complaining of Joseph L. White, defendant, for cause of action show to the court the following facts: Martha Ann Van Horn resides in the city of St. Louis, in the State of Missouri, and is a *bona fide* citizen of said State and city; that Mary Ann Boling and Wm. W. Boling reside in the county of Meade, in the State of Kentucky, and are *bona fide* citizens of said State and county; that Elizabeth Evans and David B. Evans reside in the city of St. Louis and State of Missouri and are *bona fide* citizens of said State and Co.; that defendant, Joseph L. White, resides and is a *bona fide* citizen of Hill county and State of Texas.

That on the 1st day of September, 1885, plaintiffs were lawfully seized and possessed of the tract of land hereinafter described, situated in the county of Hill and State of Texas, holding the same in fee-simple; that each of said plaintiffs, to wit, Martha Ann Van Horn, Mary Ann Boling, and Elizabeth Evans, is now and
2 was then owner of an undivided one-third interest in fee-simple in said land; that on the day and year last aforesaid defendant entered upon said premises and ejected plaintiffs therefrom and unlawfully withholds from plaintiffs the possession thereof, to their great damage ten thousand dollars; that the premises so entered upon and unlawfully withheld by defendant from plaintiff are bounded and described as follows: A certain tract of land situated in Hill county, Texas, patented to J. H. Chism on March 17th, 1858, and more particularly described as follows: A certain tract of land situated on the waters of Ash creek, about 15 miles S.

71 E. from the town of Hillsboro'. Begin-ing at the S. E. corner of C. Hullen's 640-acre survey, a locust marked as a corner, from which an elm 12 inches in diameter b'rs S. 49 W. 45 vrs.; another 12 in. dia. bears S. 77½ W. 40 vrs.; thence N. 30 W. with said Hullin's E. line 2,688 vrs. to his N. E. cor., a stake, whence a mesquite 5 in. in dia. bears N. 27½ E. 29 vrs., a do. bears N. 5 E. 55 vrs.; thence N. 60 E. with S. Jennings' S. line at 1,020 vrs., his S. E. cor. and the S. W. cor. of W. Stephens' survey, at 3,100 vrs., a stake in said Stephens' S. line, whence an elm 12 in. dia. b'rs N. 20 vrs.; thence S. 30 E. 2,688 vrs. to a stake in the prairie; thence S. 60 W. 3,100 vrs. to place of beginning, containing one-third of a league of land, 1,476 acres. That said tract of land is of the reasonable value of fifteen thousand dollars; that the reasonable rental value of said land is the sum of one dollar per acre per annum, the same being valuable pasture land. Wherefore plaintiffs pray that the defendant be cited to answer this petition; that they have judgment for the restitution of their said premises, for their rents, and for costs of suit.

T. W. GREGORY,
McKINNON & CARLTON,
Att'ys for Plaintiffs.

3 Endorsed: No. 399. M. A. Van Horn *et al. vs.* Joseph L. White. Plaintiffs' original petition. This action is brought as well to try title as for damages. T. W. Gregory, McKinnon & Carlton, att'ys for plaintiffs. Filed Oct. 2, 1889. J. H. Finks, clerk.

1st Amended Original Answer of Defendant White.

In the Circuit Court of the U. S., Northern District of Texas, at Waco.

M. A. VAN HORN *et al.*
vs. } No. 399.
JOSEPH L. WHITE.

Now comes the defendant, Joseph L. White, and, leave of the court first obtained, files this his first amended original answer, amending his original answer filed in the above-entitled cause, on the 7th day of November, 1889, and says:

Now comes the defendant, Joseph L. White, and, excepting to the plaintiffs' petition herein, says that the same is insufficient in law for the said plaintiffs to further have and maintain their said action; and of this defendant prays judgment of the court.

B. D. TARLTON & W. C. MORROW,
Att'ys for Def't.

And for plea herein said defendant denies all and singular the allegations contained in plaintiffs' petition, and demands strict proof of the same; and said defendant says that he is not guilty of the wrongs and trespasses charged against him in said suit; of all of which he puts himself upon the country.

B. D. TARLTON & W. C. MORROW,
Att'ys for Def't.

And for further plea in this behalf this defendant, Joseph L. White, says that the said plaintiffs ought not to have and maintain the*re* aforesaid action herein against him, because he says that he and those under whom he claims have had and held peaceable and
adverse possession under title from and under the State of
4 Texas for more than three years next before the commence-
ment of this suit; and this he is ready to verify. Wherefore, pleading the statute of three years' limitation, this defendant prays judgment, &c.

B. D. TARLTON & W. C. MORROW,
Att'ys for Joseph L. White.

And for further plea in this behalf the said defendant says the said plaintiffs ought not to have and maintain their aforesaid action against him, because he says that he and those whose estate he has, claiming the same under a deed or deeds duly registered, have had and held peaceable and adverse possession of the lands and tenements claimed in said plaintiffs' petition, using and enjoying the same and paying all taxes due thereon, for a period of more than five years next before the commencement of this suit; and this said defendant is ready to verify. Wherefore, pleading the statute of five years' limitations, defendant prays judgment, &c.

B. D. TARLTON & W. C. MORROW,
Att'ys for Def't White.

And now comes the said defendant and suggests to the court that he and those under whom he claims have had adverse possession of the land described in plaintiffs' petition in good faith for more than one year next before the commencement of this suit; that during the time he has ha*s* such possession he has made valuable improvements on said lands as follows, to wit, that he has made two tanks on said lands of the reasonable value of $75.00 each, making a total value of $150.00; that he has built on said land, of post and wire, 6 miles of fence of the reasonable value of $900.00; that the grounds of said claim so made are as follows: this defendant believed that W. R. Baker was the owner of said land, and, so
believing, in good faith this defendant, together with one
5 Geo. G. White, purchased each an undivided half interest
for a valuable consideration on, to wit, the 20th day of May, 1882, from said W. R. Baker the said land, and took from him a deed with clause of general warranty therefor; that afterwards, to wit, on the 6th day of October, 1883, this defendant, believing the said Geo. G. White was the owner of an undivided half of said land, in good faith for a valuable consideration purchased said ½ interest in said land from said Geo. G. White and took from him a deed to the same, with clause of general warranty. Said defendant says that the value of said land without reference to the improve-

ments thereon is $5.00 per acre; all of which said defendant is ready to verify. Wherefore he prays judgment of the court for the value of said improvements as aforesaid.

B. D. TARLTON & W. C. MORROW,
Att'ys for J. L. White.

And said defendant, further answering, states the following facts: That the said defendant claims title to the land described in plaintiff's petition under deeds with covenants of general warranty; that W. R. Baker, who, at the time of his death hereinafter referred to, resided in Harris county, State of Texas, did make, execute, and deliver to this defendant, Joseph L. White, and to Geo. G. White a deed of conveyance conveying the land described in plaintiffs' petition to the said Joseph L. White and Geo. G. White; that said deed was made, executed, and delivered on, to wit, the 20th day of May, 1882; that in consideration of the execution and delivery of said deed conveying said land the said Joseph L. White and the said Geo. G. White did pay to the said W. R. Baker the sum of $1,230.00 on, to wit, the 20th day of May, 1882, and in further consideration for said land did execute and deliver to said W. R. Baker, payable
to his order on the 1st day of December, 1882, with ten per
6 cent. interest from date until paid, their certain promissory
note for the sum of $2,460.00; that afterwards, to wit, on the 31st day of August, 1882, and before the maturity of said note, they paid said note with interest, amounting to the sum of $2,570.00; that of the said sums of money so paid the defendant paid one-half, and under said deed of conveyance acquired an undivided one-half of said land; that by and in said deed the said W. R. Baker did agree and bind himself that he would forever warrant and defend the title to said land unto the said Joseph L. White and Geo. G. White, their heirs and assigns, against the claims of all persons whomsoever lawfully claiming the same or any part thereof; that the said W. R. Baker did thereby become liable and promised to pay to the said Joseph L. White, his heirs or assigns, one-half of the said sums of money so paid as aforesaid, with 8 per cent. interest per annum on the amount so paid from the respective dates of said payments, in case he should be divested of his title to said land, and to the said Geo. G. White half of said sums of money so paid as aforesaid, with 8 per cent. interest per annum upon the amount so paid from the respective dates of said payments, in case he should be divested of his title to said land. Def't further shows to the court that on the 6th day of October, 1883, the said Geo. G. White, who resides in Hill county, Texas, did execute and deliver to this def't his deed of conveyance, with covenant of general warranty, conveying to this defendant his undivided one-half interest in the land described in plaintiffs' petition; that in consideration of said deed of conveyance this defendant did pay to the said Geo. G. White certain tracts of land in Hill county, Texas; that the price of said land so paid to the said Geo. G. White was the sum of $3,789.00, which said price was so paid on the 6th day of October, 1883; that in the deed conveying said interest of the said Geo. G.

White in the said land described in plaintiffs' petition to de-
fendant the said Geo. G. White did agree and bind himself
7 to forever warrant and defend the title to said land unto the
said Joseph L. White, his heirs and assigns, against all per-
sons whomsoever lawfully claiming or to claim the same or any
part thereof; that the said George G. White did thereby become
liable and promise to pay to the said Joseph L. White the said
sum of money so paid to him, with legal interest thereon from the
date of said payment, in case he should be divested of the title to
said land so conveyed to him.

Defendant further avers that by reason of the said deed by the said W. R. Baker to the said Geo. G. White, whereby he bound himself as aforesaid in the covenants of general warranty unto the said J. L. & Geo. G. White, their heirs or assigns, and by reason of the said deed from Geo. G. White to the said Joseph L. White, whereby the said J. L. White became the assignee of the said Geo. G. White, the said W. R. Baker became liable and promised to pay to this defendant the said sums of money so paid by the said J. L. & Geo. G. White, with legal interest on said sums of money respectively from the dates of their respective payments aforesaid; and said defendant further shows that heretofore, to wit, on the 7th day of March, 1889, the said defendant filed his original answer in this cause, wherein he prayed that the said W. R. Baker and the said Geo. G. White be made parties defendant to this suit; that they be duly cited as the law directs to appear and defend this suit; that they and each of them be served with certified copy of plaintiffs' original petition herein and a certified copy of this answer, and that on hearing hereof, if the defendant be condemned to be evicted from said premises, he recover of and from the said W. R. Baker the sums of money so paid, with interest at the rate of 8 % per an-
num from the dates of their respective payments, and from the
said Geo. G. White the sum of $3,789.00, with interest at the rate
of 8 % per annum from the 6th day of October, 1883. De-
8 fendant further prays that in the event the judgment prayed
for against the said W. R. Baker be obtained and satisfied
that its satisfaction shall also be applied to the satisfaction of the
said judgment prayed for against the said Geo. G. White.

And said defendant further shows that heretofore to wit, on or about the 30th day of April, after the said W. R. Baker had been duly served with process requiring him to answer herein, the said W. R. Baker died; that he left a will, wherein he appointed H. D. Taylor, E. P. Hill, and P. K. Ewing independent executors, with power of survivorship in such executors, which will was duly and legally admitted to probate by the honorable county court of Harris county on September 13th, 1890.

That said Taylor, Ewing, and Hill heretofore, to wit, on or about the 1st day of October, 1890, duly qualified in said Harris county court, and so recognized by said county court as such executors of the last will and testament of said Baker; that on or about the — day of May, 1890, in open court, at a regular term of this court, the death of said W. R. Baker was by the said defendant White sug-

gested and made known to the court and an order of said court entered that a writ of *scire facias* issue requiring the legal representatives of said Baker, when known, to appear at the next regular term of this court and show cause, if any they have, why they should not be made party defendants in said cause; that on the 9th day of October, 1890, said defendant, J. L. White, filed in this cause his application for a writ of *scire facias* to issue requiring the said H. D. Taylor, E. P. Hill, and P. K. Ewing, who in said application were sworn to be the executors and legal representatives of the said W. R. Baker and residents of Harris county, Texas, to appear and show cause why they should not be made parties defendant in said cause; that said writ was on or about the 2nd day of October duly served on each of said executors; that *said* the said service
9 of said writ on them the said H. D. Taylor has died, leaving the survivors, the said E. P. Hill and P. K. Ewing, the executors and legal representatives of the said W. R. Baker, dec'd; that as such they became liable to the defendant by reason of the pre*n*ises for the sums of money so paid by said J. L. White and Geo. G. White. Defendant therefore prays that in case he be condemned to be evicted from said land he have judgment against the said E. P. Hill and P. K. Ewing, executors as aforesaid, for the sum of $1,230.00, with 8 % interest per annum from the 20th day of May, 1882, and for the sum of $2,570.00. with 8 % interest per annum from the 31st day of August, 1882, and he prays that the said G. G. White be cited to appear and answer herein, and that in the event he be condemned to be evicted from said land he have judgment against the said G. G. White for the sum of $3,789.00, with interest at the rate of 8 % per annum from the 6th day of October, 1883, and in the event he be condemned to be evicted from a part of said land he prays for judgment against said White and said Hill and said Taylor, executors, for the *pro rata* part of said sums of money so paid, with interest as aforesaid, such part to be proportioned as the part of said land so lost by defendant, J. L. White, is to the whole of said land so bought from them respectively; and he prays that the satisfaction of such judgment as he shall obtain against the said executors shall go toward the satisfaction of such judgment as he shall obtain against the said G. G. White.

And the said defendant prays for costs and for general relief.

B. D. TARLTON & W. C. MORROW,
Att'ys for Def't White.

Endorsed: No. 399. M. A. Van Horn *et al. vs.* Joseph L. White. 1st amended original answer of defendant, J. L. White. Filed Dec. 15, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

10 *Plea of Baker to Jurisdiction.*

In Circuit Court of the United States for the Northern District of Texas.

M. A. VAN HORN *et al.*
vs. No. 399.
JOSEPH L. WHITE.

Now comes Wm. R. Baker for this purpose only, and says this court has no jurisdiction of him or his person as to the suit sought to be brought over against him by the defendant, Joseph L. White, on the alleged covenant of warranty of said Baker, because this defendant was not, at the time of filing said plea or service of citation to answer same, an inhabitant of the northern district of Texas, but was a resident and inhabitant of Harris county, in the eastern district of Texas; all of which appears from the record.

Wherefore he prays that he be dismissed hence with his costs in this behalf incurred.

ALEXANDER, WINTER & CAMPBELL,
Att'ys for said W. R. Baker.

Endorsed: No. 399. M. A. Van Horn *et al.* *vs.* Joseph L. White. Plea of Baker to jurisdiction. Filed Ap'l 14, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

Affidavit of Forgery.

M. A. VAN HORN *et al.* No. 399. Suit Pending in U. S. Circuit
vs. Court, Northern District of Texas, at
JOSEPH L. WHITE. Waco.

Personally appeared before me, Thomas F. Taylor, a notary public in and for Travis County, Texas, T. W. Gregory, who is well known to me, and who, being by me duly sworn, states on oath for the plaintiffs in the above cause and as attorney for the said plaintiffs that he believes to be a forgery the original of a certain instrument of writing, a certified copy of which was filed in the papers of
this said cause on April 18, A. D. 1890, by J. H. Finks, clerk of
11 said court, and notice of said filing given to attorneys for
said plaintiffs in this suit, the said certified copy of said instrument being a copy of a conveyance from J. H. Chisholm to E. M. Robinson, purporting to convey a head-right for one-third of a league of land, described in the body of said conveyance as follows: "I, J. H. Chism, * * * do hereby sell * * * my head-right for one-third of a league of land, No. —, dated Nov. —, 1838, issued by the board of land commissioners for Harrisburg county, together with the land upon which the same may be located," said original conveyance being signed "J. H. Chisholm," dated at Houston, Dec. 2nd, 1838, witnessed by Geo. W. Lively and J. A. Southmayd, and purporting to have been acknowledged at Houston Dec.

2nd, 1838, before A. Biscoe, chief justice, provided, it is claimed by the defendant, that the identical party who signed said original conveyance, a copy of which is on file as aforesaid, was J. H. Chism, who received a head-right certificate for a third of a league of land from the Republic of Texas by virtue of his service as a soldier in the war between the Republic of Texas and Mexico; and affiant says, under oath, that if said certified copy of said conveyance aforesaid is filed in this suit for the purpose of establishing the original thereof for the purpose of showing a conveyance by said J. H. Chism of his said head-right certificate for one-third of a league of land, then he swears that he believes said original conveyance as the act and deed of said J. H. Chism is a forgery.

T. W. GREGORY.

Sworn to and subscribed before me this 24th day of April, A. D. 1890.

[SEAL.]

THOMAS F. TAYLOR,
Notary Public, Travis Co., Texas.

Endorsed: No. 399. M. A. Van Horn *et al. vs.* Joseph L. White. Affidavit. Filed April 25, 1890. J. H. Finks, clerk.

12 *Plaintiffs' 1st Supplemental Petition.*

M. A. VAN HORN *et al.* *vs.* JOSEPH L. WHITE *et al.* } No. 399. Suit in U. S. Cir. Ct, Northern District of Texas, at Waco.

Now come the plaintiffs, leave of the court — had, — file this their first supplemental petition, and, in replication to the statutes of limitation pleaded by the defendant White, show to the court that the plaintiffs in this cause claim title to the land in controversy as the heirs-at-law of J. H. Chism; that M. A. Van Horn, Elizabeth Evans, and Mary Ann Boling are the sisters of said J. H. Chism and his sole surviving heirs-at-law; that said Elizabeth Evans and Mary Ann Boling were, at the date of the taking possession of the land in controversy by the said J. L. White and those under whom he claims title, *were* married women and are now and have been ever since said date; that Elizabeth Evans is the wife of David B. Evans and has so been since and before the date of said possession; that Mary Ann Boling is the wife of Wm. W. Boling and has so been since and before the date of said possession. Wherefore as to said named plaintiffs they say on account of coverture the said statute of three and five years' limitations pleaded by defendant cannot apply and prevent them from recovering the land in controversy.

Said plaintiffs further show that the defendants, on their claim of title to the land in controversy, deraign title through a forged pretended deed of conveyance, to wit, a pretended deed which defendants claim is a transfer of the head-right certificate, by virtue of which the land in this controversy was patented by the State of

Texas to J. H. Chism, and therefore in law said pleas of three and five years' limitations cannot avail; and this they are ready to verify.

T. W. GREGORY,
McKINNON & CARLTON,
Att'ys for Pl'ff.

13 Endorsed: No. 399. M. A. Van Horn *et al. vs.* Joseph L.
White. Plaintiffs' 1st supplemental petition. Filed May 2,
1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

Defendant Joseph L. White's 1st Supplemental Answer.

M. A. VAN HORN *et al.*
vs.
JOSEPH L. WHITE.
Suit Pending in the U. S. Circuit Court, Northern District of Texas, at Waco.

Now comes the defendant, Joseph L. White, and files this his 1st supplemental answer in this behalf, and says—

That at the last term of this court, in open court, it was suggested by the said defendant and made known to the court that W. R. Baker, one of the defendants in the above-styled cause, had died since the next preceding term of this court and an order of this court was made directing that a writ of *scire facias* issue requiring the legal representatives of said Baker, when known, to appear at the next term of this court and show cause, if any they had, why they should not be made parties defendant in said cause; that since the last term of this court the following-named persons have been appointed and duly qualified as the executors of the will of the said W. R. Baker, dec'd, viz., H. D. Taylor, E. P. Hill, and P. K. Ewing, all of whom reside in Harris county, Texas, and defendant, J. L. White, therefore prays that a writ of *scire facias* be issued by the clerk of this court, in terms of law, requiring each of said executors of said W. R. Baker to appear and show cause why they should not be made parties defendant in said cause, and said writ be accompanied by a certified copy of plaintiffs' original and first supplemental petition and of the original answer of defendant, J. L. White, and of this supplemental answer; and, as in duty bound, &c.

B. D. TARLTON & W. C. MORROW,
Att'ys for J. L. White.

Endorsed: No. 399. M. A. Van Horn *et al. vs.* Joseph L.
14 White, defendant. Joseph L. White's 1st supplemental
answer praying for *scire facias* to make parties. Filed Oct.
9, 1890. J. H. Finks, clerk.

Answer of Defendants Hill and Ewing.

In the Circuit Court of the U. S. for Northern District of Texas, at Waco.

M. A. VAN HORN *et al.*
vs.
JOSEPH L. WHITE *et al.*
No. 399.

Now come for this purpose only E. P. Hill and P. K. Ewing, who are alleged to be the executors of the will of W. R. Baker, deceased, and suggest to the court that said H. D. Taylor is dead, and say that this court has no jurisdiction of them or their persons in the matter complained of, for that it appears from the record that said W. R. Baker at the commencement of this suit and when process was served upon him was a resident citizen of Harris county and of the eastern district of Texas, in which district said process was served, and that he in his life pleaded to the jurisdiction of this court on said ground, which plea was pending and undetermined at his death, and the said Hill and the said Ewing say it also appears from the record that they and the said Taylor, when this suit was commenced against them as executors of the will of said Baker, were residents and citizens of Harris county, in the eastern district of Texas, when said process was served, and were such at time of service of citation on them and each of them. Wherefore they say that said White cannot maintain said suit against them for breach of warranty of their said testate in this court; wherefore these defendants pray judgment of the court and that they be discharged with their costs.

ALEXANDER & CAMPBELL,
Att'ys for Def'ts Hill and Ewing.

Not in any manner waiving the foregoing plea, demurrer
15 to the jurisdiction, if further required to answer, these de-
fendants demur and say that the matters and things set up in the plea and complaint of said White against them and their alleged testate are insufficient in law for him to have and maintain his said action, and they except specially to the same for this:

1st. Because it is not competent for a court of law to entertain a contingent demand that the complainant be allowed to recover in the event that the original plaintiff recover against him while he resists the demand of plaintiff and denies his cause of action.

2nd. Because the action of ejectment or trespass to try title is *sui generis*, and in such only the title to the land between the parties plaintiff and defendant can be litigated, and in which it is not competent to determine the indebtedness of a third party to one of them.

3rd. Because it does not appear from said complaint of said White that he has been ejected either actually or constructively of that the original plaintiffs have a paramount title, but the pleadings of said White against plaintiffs deny and put in issue the title of plaintiffs; of all which these defendants pray the judgment of the court.

For further answer, if required, these defendants deny all and singular the allegations of the complainant, the said White, and put themselves upon the country.

And for further plea these defendants say that, if said White should recover at all, he ought not to recover interest as prayed on the amounts alleged to have been paid to said Baker, because these defendants aver that the said alleged vendees of the said Baker have, since the date of the said alleged conveyance of said Baker, had possession and control and the use of said premises; which they are ready to verify.

16 ALEXANDER & CAMPBELL,
Att'ys for said Hill and Ewing.

Endorsed: No. 399. M. A. Van Horn *et al. vs.* Jos. L. White *et al.* Answer of defendants Hill and Ewing. Filed Dec. 6, 1890. J. H. Finks, clerk, by C. A. Richardson, deputy.

Answer of George G. White.

M. A. VAN HORN *et al.*
vs.
JOSEPH L. WHITE.
} Suit Pending in U. S. Circuit Court, Northern District of Texas, at Waco.

And now comes Geo. G. White and for answer to the plea of Joseph L. White, seeking judgment herein against him on his warranty, admits the facts stated in said plea and hereby agrees that the court shall enter such judgment thereon as it shall deem just and proper under the averments of said answer.

GEO. G. WHITE.

Endorsed: M. A. Van Horn *et al. vs.* Joseph L. White. Answer of Geo. G. White. Filed Dec. 15, 1890. J. H. Finks, clerk.

Demurrer, &c., of Henry Brashear.

In the Circuit Court of the United States.

M. A. VAN HORN *et al.*
vs.
JOSEPH L. WHITE.
} No. 399.

Now comes H. Brashear, made party defendant to original defendant's complaint herein, — with consent of counsel and leave of the court adopts the demurrer and pleas to the jurisdiction and other pleadings of defendants E. P. Hill and P. K. Ewing as if the name of this defendant were written therein.

ALEXANDER & CAMPBELL,
Att'ys for said Brashear, Defendant.

17 Endorsed: No. 399. M. A. Van Horn *et al.* *vs.* Joseph L. White. Demurrer, &c., of Henry Brashear. Filed May 5, 1891. J. H. Finks, clerk, by C. A. Richardson, deputy.

Charge of the Court.

In the United States Circuit Court for the Northern District of Texas, at Waco.

M. A. VAN HORN *et al.*
vs. } No. 399.
JOSEPH L. WHITE *et al.*

GENTLEMEN: You already understand from the statement of the pleadings, the proof, and the argument of counsel that the plaintiffs sue to recover one-third of a league of land described in the pleadings as the heirs and only heirs of James H. Chism, to whom the board of land commissioners of Harrisburg county issued a land certificate, 990, on which said land was located, and the undisputed proof in this case shows that the plaintiffs are the heirs and only heirs of the James H. Chism to whom said certificate issued and are entitled to recover in this suit unless said grantee in the certificate 990 sold the same in his lifetime, or as to Mrs. Van Horn's one-third interest that plaintiffs are defeated by the defendants' plea of the five years' statute of limitation.

The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed J. H. Chisholm, and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendants cannot defeat the plaintiffs' recovery of two-thirds of the land sued for; and on this issue, as to the person who made said transfer being the same person to whom said certificate No. 990 issued, the
18 burden of proof is on the defendants; and if the proof does not so satisfy you the plaintiffs are entitled to recover the whole land unless defeated by the defendants' plea of five years limitation as to Mrs. Van Horn's one-third interest therein. By the statute of limitation of this State any person having exclusive, actual, adverse possession of land under a deed duly recorded, using and enjoying the same for a period of five years and payment of taxes thereon, acquires title to the same and can defeat a recovery by the person who would otherwise be the owner, unless such person in possession, in the absence of such statute of the five years' limitation, would deraign title through a forged deed, in which case he is not permitted to recover on the plea of the five years' limitation; and the undisputed proof in this case shows that unless the proof satisfies you that said transfer of the certificate offered in evidence on the trial is forged the defendants are entitled to retain $\frac{1}{3}$ of the land in controversy under their said plea of the five years' limitation, and on this issue as to the said transfer being forged or not the burden

of proof is on the plaintiffs, and in this connection I give you here these special charges requested by the plaintiffs. (Judge here read special charges 1, 2, 3, and 4 requested by plaintiffs in the order of their respective numbers, as follows:)

Special charge No. 1 asked by plaintiffs.—If you believe from the evidence that W. R. Baker falsely made or caused or procured to be falsely made or in any way aided, assisted, advised, or encouraged the false making of the transfer to E. M. Robinson, signed J. H. Chisholm, and purporting to convey the land certificate No. 990, issued to J. H. Chism, with intent to make money or valuable thing thereby or with intent to set up a claim or title or to aid or assist any one
else in setting up a claim or title to the land in controversy
19 or in way to injure, obtain the advantage of, or prejudice the
rights or interest of the true owner of the land, then the said transfer is a forgery, and you will find for plaintiffs for the land in controversy.

McKINNON & CARLTON,
F. W. GREGORY,
Att'ys for Plaintiffs.

Special charge No. 2 asked by plaintiffs.—If you believe from the evidence that a man of the name of J. H. Chisholm or of any other name who was not the identical party to whom the certificate No. 990 issued to J. H. Chism did falsely make the transfer to E. M. Robinson, signed "J. H. Chisholm," with the intent to make money or other valuable thing thereby or with intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy or in any way to injure, obtain the advantage of, or prejudice the rights or interests of the true owners of this land or with any fraudulent intent whatever, then said instrument you will find to be a forgery, and you will bring a verdict for plaintiffs for the land in controversy.

McKINNON & CARLTON,
T. W. GREGORY,
Att'ys for Plaintiffts.

Special charge No. 3 asked by plaintiffs.—If you believe from the evidence that J. H. Chisholm or any other person not being the identical person to whom certificate No. 990, in the name of J. H. Chism, issued did falsely counterfeit the original grantee in making the transfer to E. M. Robinson, signed J. H. Chisholm, with the intent to make money or other valuable thing thereby or with the intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy or to cast a cloud upon the title or in any way injure, obtain the advantage of, or prejudice the rights of the true owner of the land or with any fraudulent intent whatever, then you will find such instrument a forgery, and you will find for the plaintiffs for the land in controversy.

McKINNON & CARLTON,
T. W. GREGORY,
Att'ys for Plaintiffs.

Special charge No. 4 asked by plaintiffs.—The certificate in this case issued to J. H. Chism. Defendant claims through a transfer to E. M. Robinson, signed J. H. Chisholm. The burden of proof 20 is upon defendants to show that the man who signed this transfer was the identical man to whom the certificate issued. If he has failed to show this identity, you will find for plaintiffs for two-thirds of the land, unless you believe from the evidence and under the charge of the court that the transfer above alluded to is a forgery, in which event you will find for the plaintiffs for all the land in controversy.

McKINNON & CARLTON,
T. W. GREGORY,
Att'ys for Plaintiffs.

This last special charge has already been given you in substance in my oral charge. The defendant White suggests that he has made improvements in good faith, and the proof shows that he has put about six miles of fence and two tanks on this land in good faith, and if you find the whole land for the plaintiffs you will find for defendant White the value of his said improvements as shown by the proof, less the value as shown by the proof of the use and occupation of said land from the 2nd October, 1887, until this day. If you find for the plaintiffs, but only for ⅔rds of the land, you will not find the value of improvements in good faith or of rents, but leave that matter for subsequent settlement in a proceeding for partition.

The defendant White bought the land with general warranty from W. R. Baker, whose executors are parties to this suit, and if you find for the plaintiffs the whole of the land in controversy you will find for the defendant White, against the executors of said Baker, the sum of thirty-six hundred and ninety dollars, with eight per cent. per annum — from the 2d October, 1887, to this day. If you find for the plaintiffs, but for only two-thirds of the land, you will find in favor of White and against Baker's executors for the sum of $2,460.00, with eight per cent. per annum interest from the 2nd October, 1887, until this day.

On the suggestion in writing by plaintiffs' counsel of an omission of the charge the trial judge further charged the jury 21 as follows: If you find for the defendant White the value of his improvements under the charge given you, and the amount exceeds the value of the use and occupation as you may find from the proof from the 2nd October, 1887, you will find from the proof the value of the use and occupation from the time said White took possession, not to exceed the value of the improvements, and deduct it from the value of said improvements. If you find for the plaintiffs all the land in controversy, your verdict must show the value of the land without regard to improvements, the value of the improvements, the value of the use and occupation, and the amount you find in favor of White against Baker's executors on Baker's warranty. If you find for the plaintiffs, but only for two-thirds of the land, you will so show by your verdict, and show what amount you find against Baker's executors. If you find for the defendant, you will return a general verdict "for defendants."

This charge was reduced to writing after the trial.

A. P. McCORMICK, *Judge*.

Endorsed: M. A. Van Horn *et al.* *vs.* Jos. L. White. Charge. Filed May 8, 1891. J. H. Finks, clerk.

Judgment.

M. A. VAN HORN *et al.* }
vs. } No. 399.
JOSEPH L. WHITE. }

On this the fifth day of May, 1891, this cause being called, there came on to be heard the demurrer of P. K. Ewing, E. P. Hill, and Henry Brashear, executors of the will of W. R. Baker, deceased, to the jurisdiction of this court, on the ground that their said estate was, and that they were at the time of the filing of the complaint
of J. L. White against them and at the time of the service of
22 the citation upon them resident citizens of the eastern dis-
trict of Texas, as appears from the record; and the court having heard and considered the said demurrer, it is adjudged that the same be overruled; to which ruling of the court the said Ewing, Hill, and Brashear then and there excepted and prayed that their exceptions be made a part of the record, which is here now entered; and then came on to be heard the demurrer and special exceptions of said Ewing, Hill, and Brashear to the pleading of J. L. White against them, as the same appear by record, and after hearing the same it is considered and adjudged by the court that said demurreres and exceptions be overruled; to which ruling of the court said Ewing, Hill, and Brashear then and there excepted and prayed that their exceptions be made a part of the record, which is here now accordingly done. Thereupon the parties plaintiffs and defendant White and said Ewing, Hill, and Brashear, defendants to the complaint of said White, by their respective attorneys, announced ready for trial; whereupon came a jury of twelve good and lawful men, to wit, B. T. Sargent, H. K. Black, P. Norman, J. A. McMurray, Jas. R. Randle, Alf. Mills, A. C. Womack, W. M. Sparkman, J. E. Brown, Brown Moore, T. R. Russell, and M. S. Greer, who were duly impaneled, tried, and sworn according to law to try said cause, who, after hearing the evidence, the argument of counsel, and charge of the court, retired to consider of their verdict, and who afterwards, to wit, on the 6th day of May, 1891, returned into open court the following verdict, to wit:

"We, the jury, find for the plaintiff for the full amount of 1,476 acres of land, value $10 ten dollars, per acre. We find for plaintiffs three hundred and fifty dollars for rent of land. We find for defendant seven hundred and fifty dollars for improvements on land. We find for defendant against the estate of W. R. Baker three thousand six hundred and ninety dollars, with interest at 8% annually from October 2nd, 1887.

M. S. GREER, *Foreman.*"

23 It is therefore ordered and adjudged by the court that the plaintiffs Martha Ann Van Horn, widow; Mary Ann Boling, joined by her husband, Wm. W. Boling, and Elizabeth Evans, joined by her husband, David B. Evans, do have and recover of and from the defendant Joseph L. White the land described in plaintiffs' petition; which said land is described as follows: A certain tract of land, situated in Hill county, Texas, patented to J. H. Chism on March 17th, 1858, and more particularly described as follows: Situated on the waters of Ash creek, about 15 miles S. 71 E. from the town of Hillsboro', beginning at the S. E. corner of C. Hullen's 640 acre survey, a locust, marked as a corner, from which an elm, 12 inches in diameter, bears S. 49 W. 45 vrs.; another, 12 in. dia., bears S. 77½ W. 40 varas; thence N. 30 W. with said Hullen's E. line 2,688 vrs. to his N. E. corner, a stake, whence a mesquite, 5 in. in dia., bears N. 27½ E. 29 vrs., a do. bears N. 5 E. 55 vrs; thence N. 60 E. with S. Jennings' S. line, at 1,020 vrs. his S. E. cor. and the S. W. cor. of W. Stephens' survey, at 3,100 vrs. a stake in said Stephens' S. line, whence an elm, 12 in. dia., b'rs N. 20 vrs.; thence S. 30 E. 2,688 vrs. to a stake in the prairie; thence S. 60 W. 3,100 vrs. to place of beginning, containing one-th*ri*d of a league of land, 1,476 acres, and recover of and from said defendant all costs in this behalf incurred, for which let execution issue.

And it appearing to the court that the jury estimated the value of the land at $10.00 per acre without improvements, and the value of defendant's improvements at $750.00, and the value of the use and occupation of the premises at $350.00, and that the excess of the value of said improvements over the value of the use and occupation of said premises amounts to $400.00, it is the judgment of the court that the defendant Joseph L. White do have and recover of and from the said plaintiffs the said excess of $400, together with interest thereon, from rendition hereof, at 8% per annum.

24 It is further ordered that no writ of possession shall be issued for the term of one year after the date of this judgment, unless the plaintiffs shall pay to the clerk of this court for the defendant the amount of such judgment in favor of the defendant, with the interest thereon; but if they do so pay said amount, then they may have their writ of possession as in ordinary cases. If the plaintiffs shall neglect for the term of one year to pay over the amount of said judgment in favor of the defendant, with the interest thereon, as hereinbefore directed, and the defendant shall, within six months after the expiration of said one year, pay to the clerk of this court for the plaintiffs the value of said 1,476 acres of land without regard to improvements, which said value was estimated by the jury at $10 per acre, then the plaintiffs shall be forever barred of their writ of possession or from ever having or maintaining any action whatever against the defendant, his heirs or assigns, for the land recovered in this suit. If the defendant or his legal

representatives shall not, within the six months aforesaid, pay over to the clerk of this court for the plaintiffs the estimated value of the said land, as hereinbefore directed, then the plaintiffs may sue out their writ of possession as in ordinary cases.

It is further ordered and adjudged by the court that the defendant Joseph L. White do have and recover of and from P. K. Ewing, E. P. Hill, and Henry Brashear, independent executors of the estate of said W. R. Baker, who was the warrantor of said defendant, the sum of three thousand six hundred and ninety dollars, with interest thereon, at eight per cent. per annum, from October 2nd, 1887, and it is ordered that execution issue in favor of said Joseph L. White against said P. K. Ewing, E. P. Hill, and Henry Brashear, independent executors, as to any property of said estate, as to any property in their hands as said executors, for said sum so adjudged to the said Joseph L. White.

24½ It is further ordered that Joseph L. White recover of and from Geo. G. White the sum of thirty-seven hundred and eighty-nine dollars, with interest from October 6th, 1883, at 8 % per annum, for which the said Joseph L. White may have his execution, and it is further ordered that any amount collected on the judgment in favor of J. L. White against the aforesaid executors be applied in satisfaction of this judgment against G. G. White, in favor of J. L. White. It is also ordered that the officers of court recover of plaintiffs and defendants respectively all costs by them incurred, for which execution may issue.

It is further ordered by the court that defendant, Joseph L. White, recover of and from P. K. Ewing, E. P. Hill, and Henry Brashear, as independent executors of the estate of W. R. Baker, all costs incurred in bringing in said Baker and his executors, for which let execution issue.

Defendant's Motion for New Trial.

In U. S. Circuit Court for the Northern District of Texas, at Waco.

M. A. Van Horn *et al.*
vs. } No. 399.
J. L. White.

Now comes the defendant, J. L. White, and moves the court to set aside the verdict of the jury herein and grant him a new trial on the following grounds, to wit:

1st. Because the court erred in refusing charge No. 1, requested by defendant, because applicable to the case, and the facts therein affirmatively stated to the jury were proven and there was no opposing evidence, and it was the law, as stated in said charge, and it is a presumption of fact that the person in possession of a certificate is the owner in the absence of evidence to the contrary, although he have no written assignment, and the evidence in this case raised the issue as to whether the person who transferred to

Robinson was the owner of the certificate by transfer from
25 the grantee thereof if he was not in fact the grantee, and the
evidence of plaintiff, by which it was sought to show that the certificate was not in the hands of Baker in 1838, at the time indicated, was wholly conclusive and legally and logically had no tendency to show the whereabouts of the certificate.

2nd. The court erred in refusing the second charge requested by the defendant, indicating to the jury the facts which had a tendency to show that the person who delivered the certificate to Baker, as testified by him, was the grantee thereof as recited in said charge No. 2.

3rd. The court erred in refusing the third charge requested by the defendant, to the effect that the certificate is now in the land office upon which the land is patented, and if the certificate or paper about which plaintiff's witnesses testified was burned, as indicated by them, then the paper testified about by them was not this certificate. If the plaintiff's testimony showed anything about the papers at all and was credible it showed that the papers had been burned, and that there were other papers—that is to say, the discharge and probably other land certificates than the one in question, and it was proper that the attention of the jury should have been directed to this fact.

4th. The court erred in the submission to the jury of the issue as to whether the transfer to Robinson of the certificate was forgery, because the evidence did not raise the issue, and at all events the court should have submitted to the jury in apt language the circumstances under which such a transfer would have been a forgery upon the part of the person who signed the certificate, which it failed to do, and should in the same connection have instructed the jury as to the legal and logical effect of the possession of the certificate. The failure to give such instruction or explanation to
the jury after charging them that if the transfer was not
26 made by the grantee that the plaintiff could recover two-
thirds of the land rendered nugatory that part of the charge of the court which instructed the jury that the burden was on plaintiff to show that the transfer was a forgery.

5th. The court erred in giving charges numbered 1 to 4, inclusive, as requested by plaintiff as follows, to wit:

First. Said charge No. 1, in the absence of any evidence to raise the issue, submits to the jury whether W. R. Baker falsely made or aided, assisted, advised, or encouraged the false making of the transfer to Robinson with the intent, etc. The court having already submitted in its charge, by giving the third charge, submitted the same question as to the person who made the transfer under the name of Chisholm, the charge as to Baker was wholly superfluous and unnecessary to illustrate the case, and was calculated to, and most probably did, disparage in the minds of the jury the entire testimony of Baker upon which defendant's defense was based. Said charge assumes that the transfer was false and falsely made.

Second. Charge second given at the request of plaintiff was error, because it does not explain to the jury what was meant by falsely making a transfer by the name of Chisholm and may have misled the jury to suppose that although he was the original grantee of the certificate or the assignee of such grantee that the signing of the na-e of Chisholm to the paper purporting to convey certificate granted to Chism was the false making of the instrument.

Third. Charge three is erroneous because the counterfeiting of a person as therein submitted to the jury is not forgery under the laws of the State of Texas. This charge in its phraseology is upon the weight of evidence and given in such a manner and in such language as to influence the jury to a finding not warranted by the evidence. The issue submitted therein is not raised by the evidence.

27 4th. The 4th charge given at the request of plaintiff was error, because it was not necessary for defendant under the circumstances to show that the person who transferred this certificate to Robinson was the original grantee thereof, it being in evidence by Baker that he received the certificate from a person in possession thereof within about thirty days after its issuance and while the grantee was in the limits of the State of Texas. Said charge was error again in submitting to the jury in general terms whether the transfer of the certificate was a forgery without any concurrent definition thereof.

6th. The court erred in charges given in assuming the person who made the transfer and in making said transfer spells his name Chisholm was a different person from a man named Chism to whom the certificate was issued, notwithstanding the fact that the names were and are *idem sonans*.

7th. The four charges given by request of plaintiffs were a repetition of the same matters emphasizing to the jury the question of forgery in such a manner as to probably lead them to believe that the court regarded the instrument as a forgery, and that Baker had participated in the commission of the forgery; the effect of such charges must have been to have le*ad* the jury to believe that Baker was unworthy of belief.

8th. The court erred in the admission of testimony of plaintiffs' witnesses and written testimony over the objection of defendants, as shown by bill of exceptions herein.

9th. The verdict of the jury was contrary to and unsupported by the evidence. The uncontradicted evidence shows that the person in possession of the certificate sold and delivered the same to Baker. It is not shown by any opposing evidence that said certificate was after the date 1838 in possession of any other per-
28 son than Baker, his agents, and the legal custodian thereof;
and it is conclusively shown by plaintiffs' testimony, if it shows anything, that the papers which they claim were with the certificate and the certificate itself were burned, and if it be true that any person falsely personated the grantee in the dealing with Baker there is not evidence that Baker participated in the fraud, and all of the circumstances are to the contrary purport.

10th. The verdict as to improvements is not in accord with the evidence, the uncontroverted evidence showing their value to be $900.00.

And the defendants, Ewing *et als.*, charged herein as executors of Baker, join herein.

TARLTON & MORROW,
Attorneys for Def't White.
ALEXANDER & CAMPBELL,
Attorneys for Ewing et al.

And the defendant, Joseph L. White, further moves the court to set aside the verdict and to grant him a new trial in this cause for the following additional reasons:

1st. Because the charge of the court was erroneous in limiting this defendant's right of recovery for interest on his warranty to interest to 8 % from October 2nd, 1887, when the jury were instructed that they might find for the purpose of offsetting defendant's claim for improvement, rents against defendant from the institution of this suit, and when the verdict, taken in connection with the evidence as to the rental value of the land, shows that the jury did find for the plaintiff against this defendant rents from the time of his purchase, May 25, 1882. If defendant is chargeable for rent, he is entitled on his warranty to legal interest on the amount of
29 purchase-money paid by him for the time during which he is charged.

2nd. Because the verdict of the jury is contrary to the law in limiting defendant's recovery for interest to a date beginning October 2nd, 1887, and in holding defendant responsible for the rents from May 25, 1882.

3rd. Because if the verdict is construed as assessing rents against defendant from Oct. 2, 1887, exclusively, then the amount of the same, $350, is unsupported by the evidence which showed that the annual rental value did not exceed three cents per acre.

TARLTON & MORROW,
Att'ys for Joseph L. White, Def't.

Endorsed: No. 399. M. A. Van Horn *et al. vs.* J. L. White. Motion for new trial. Filed May 7, 1891. J. H. Finks, clerk, by C. A. Richardson, deputy.

Order Overruling Motion for New Trial.

M. A. VAN HORN *et al.*
vs. } 399.
JOSEPH L. WHITE *et al.*

On the 7th day of May, 1891, came on to be heard the motion of defendants herein for a new trial, and the court, having heard said motion and the argument of counsel thereon, and having duly considered the same, is of opinion that said motion is not well taken. It is therefore ordered by the court that said motion for a new trial be, and is hereby, overruled and refused; to which ruling of the court defendants then and there in open court excepted.

Agreement.

In U. S. Circuit Court at Waco, April Term, A. D. 1891.

M. A. VAN HORN *et al.*
vs. } 399.
JOSEPH L. WHITE *et al.*

30 In view of the fact that the circuit court is about to adjourn and will adjourn this day, and there is not time before the said final adjournment to prepare the record and bills of exception in above cause and present the same to the court before such adjournment, we, the attorneys for the parties, do hereby agree that the said bills of exception may be signed and filed *nunc pro tunc* after said adjournment.

It is further agreed that the plaintiffs in error shall not be required to file his assignment of error at the time of the filing petition for writ or when the same is allowed, but may do so within a reasonable time thereafter as soon as may be practicable.

This May 9th, 1891.

T. W. GREGORY,
McKINNON & CARLTON,
Att'ys for Pl'ffs.
ALEXANDER & CAMPBELL,
Att'ys for Ewing et al., Ex'rs of Baker.
TARLTON & MORROW,
Att'ys for Def't Joseph L. White.

Endorsed: No. 399. M. A. Van Horn *et al. vs.* Joseph L. White *et al.* Agreement that record and bills of exception, &c., may be made up and filed after adjournment. Filed May 9, 1891. J. H. Finks, clerk.

Bill of Exceptions of Ewing et al.

In United States Circuit Court for the Northern District of Texas, at Waco.

M. A. VAN HORN *et al.*
vs. } 399.
J. L. WHITE.

Be it remembered that it appears from the citation to W. R. Baker in this cause and the return thereon and from the citation to P. K. Ewing, Henry Brashear, and E. P. Hill, the executors
31 of the will of W. R. Baker, and the return thereon, that said parties and each of them were served with said process by the marshal of the eastern district of Texas, in said eastern district, and that the demurrers of said parties to the jurisdiction of the court on the ground that they were not citizens of the northern district of Texas, where this suit was brought, were overruled by the court, and that to said ruling said defendants Ewing, Hill, and

Brashear in open court then and there excepted and still except, as shown by the judgment entry in this cause, and said defendants Ewing, Hill, & Brashear, executors aforesaid, pray that their exception be signed and certified as a part of the record; which is here now accordingly done in term.

A. P. McCORMICK,
U. S. Dist. Judge.

Endorsed: No. 399. M. A. Van Horn *et al.* *vs.* J. L. White. Bill of exceptions of Ewing *et al.* Filed May 9, 1891. J. H. Finks, clerk.

Defendant J. L. White's Bill of Exceptions.

In the United States Circuit Court for the Northern District of Texas, at Waco.

M. A. VAN HORN *et al.*
vs. } No. 399.
J. L. WHITE.

Bill of exceptions submitted by plaintiffs.

Be it remembered that on the trial of this cause the following evidence was offered and given to the jury: Plaintiff- read in evidence a copy of the patent from the State of Texas, dated March 17th, 1858, to J. H. Chism *to* the land claim*ing* by them as set forth in their petition; also a copy of the land certificate by virtue of which said patent issued, being as follows:

REPUBLIC OF TEXAS,
County of Harrisburg.

No. 990. Class 2.

This is to certify that J. H. Chism has appeared before us, the board of land commissioners for the county aforesaid, and proved according to law that he arrived in this Republic subsequent to the declaration of independence and previous to August, 1836, and that he is a single man and produced an honorable discharge, — is entitled to one-third of a league of land, to be surveyed after the first day of August, 1838. 32

Given under our hands, at Houston, this 1st day of Nov'r, 1838.

J. G. HUTCHISON, *President.*
JOHN WOODRUFF,
Associate Commissioner.

Attest: THOS. WM. WARD, *Clerk.*

Endorsements: 1 file, 518. Robertson. 2nd class. Certificate, one-third league. J. H. Chism. Filed January 2nd, 1858.

MARY ANN BOLING testified, by depositions taken by plaintiff on November 6, 1889, as follows:

My age is 63 on June 5, 1889; residence, Bradenburg, Meade county, Ky., where I have resided for 43 years; was born in Henry

county, Ky., and lived there until I was about five years old, as well as I can remember; knew J. H. Chism in Boone county, Ky. He was my brother, and I knew him all my life. He died in Boone county, Ky., on the 3rd of December, 1839. I was present and assisted him during his last illness, and was present when he died. He was buried at Crittenden, Grant county, Ky. At his death he was 24 years two months and 27 days old. He left no will, and was never married. His mother, Martha Chism, died Feb. 4, 1869, and his father, Elijah Chism, died in July, 1851, and neither of them left any will. J. H. Chism had a brother and three sisters. The brother's name was Isaac Newton Chism, and he died March 30, 1838, without leaving any will and never having married. The sisters were named Elizabeth, Martha, and Mary Ann Chism, all of whom are alive. Elizabeth Evans and Martha Ann Van
33 Horn live in St. Louis, Mo., and Mary Ann Boling in Bradenburg, Meade county, Ky. Elizabeth was married Nov. 15, 1836; Martha, April 7, 1837, and Mary Ann, July 27, 1846. I have in my possession a family Bible containing records of births, deaths, and marriages in the family of J. H. Chism; cannot say when the entries were made in said Bible, but the entries of births were all made in my father's handwriting; cannot say how long said Bible has been in the possession of my family, but it has been in their possession ever since I can remember, and it was my father's family Bible. I detach from said Bible the leaf containing said records of births, deaths, and marriages, mark it for identification, and attach it to my answers (said leaf showing the following entries):

“ *Family Record.*

Births.	Deaths.
Elijah C. Chism was borne January 20, 1790.	Died July, 1851.
Martha Chism was borne July 26, 1793.	Died Feb. 4, 1869.
James Harvey Chism was borne September 9, 1815.	Died December the 3, 1839, aged 24 years 2 months 27 days.
Isaac Newton Chism was born 12 of September, 1817.	Died the 30th of March, 1838, aged 22 years 6 months 18 days.
Elizabeth Chism was born May 30, 1819.	
Martha An- Chism was borne July 5, 1822.	
Mary An- Chism was born June the 5th, 1825.	

Family Record.

Marriages.	Marriages.
34 Elijah G. Chism and his wife *was* mar-ed February the 1st, 1814. Elizabeth An- was mar-ed the 15th of November, 1836. Martha An- was marr-ed Aprile 7th, 1837. Mary An- was mar-ied July the 27, 1840."	

J. H. Chism was born in Henry county, Ky., and lived there until he was about 8 years old. The family then moved to Crittenden, Boone county, Ky., where they lived about 10 years, when they moved to Florence, in the same county, and J. H. Chism lived there until he enlisted in the army. He was then about 21 years old. He went to the Republic of Texas, having enlisted to suppress some disturbance in Texas between said Republic of Texas and Mexico, to the best of my recollection, but the cause of said dist*ru*bance and the full particulars concerning the same I am unable to relate. He went from Burlington, Boone county, Ky. At the time of his leaving for Texas I was unmarried and living at home and my brother was living with the family. I suppose he enlisted with the intention of aiding in the suppression of the trouble in Texas, and after peace was declared he returned home. I do not remember how long he was in Texas on the occasion of his first trip. He returned to our home in Crittenden, Grant county, Ky. He brought back a paper showing that he had been a soldier, a paper showing his discharge from the army, and it remained in his possession up to the time of his death, after which my father had it in his possession with other papers belonging to my brother. My father placed said papers in Mr. Alanson Moreman's care. After a time the papers were returned to my father and after his death went in possession of my brother-in-law, Wm. Van Horn, and my information is that the papers were finally destroyed by fire. I do not 35 know just when they were destroyed. One of the papers stated that he was honorably discharged, and that he was an officer, but of what rank I cannot remember. I do not remember by whom this paper was signed; think it stated the rank, but I do not remember what it was. I cannot say precisely in the service of what country he was enlisted, but it was on the side of the Texans, in trouble between Texas and Mexico, and stated that he had been a soldier. After he returned home J. H. Chism again went to Texas. I do not remember when or positively as to his object, but have always been under the impression that it was to see after some land. He returned home again about the 1st of November, 1838, and brought back papers showing he was entitled to lands in Texas. To the best of my recollection, there were three papers, but I cannot give any particular description of them, except that one of them was

a narrow strip of paper. The word league was in one of them, but I do not know in which one or in what place. When he returned from Texas the last time he claimed to own land there and did not claim to have sold any land there. He returned about one year previous to his death on account of bad health. My father had charge of the papers a portion of the time and placed them in the charge of Mr. Alanson Moreman for a time, and Mr. Moreman finally returned them to my father, and they remained in his possession up to the time of his death; they were then placed in the hands of my brother-in-law, Mr. Wm. Van Horn, in whose possession (or his son's) they were when destroyed by fire. My father placed them in the hands of Mr. Moreman in order that he (Moreman) would have the land located. It was agreed that Moreman should either go or send some one to Texas to have the matter arranged. All of the papers left by J. H. Chism in regard to the land were placed in Moreman's charge. My recollection is that in about one year after this my father died. My knowledge that J. H. Chism was a soldier, in the trouble between Texas and Mexico, on the side of the Texans is based on my knowledge of the facts from being his
36 sister and having seen his discharge papers. According to my information the papers relating to his discharge were finally destroyed by fire, and I cannot give the full purport of what said papers contained. The full name of J. H. Chism was James Harvey Chism. Neither his father or mother married a second time after his death. I am married and my husband, Wm. W. Boling, is living. I was 21 years old when married and was never married but once. My sister, Elizabeth Evans, and her husband, David B. Evans, are living. Mrs. Evans was married Nov. 15, 1836, and her age is 70 years. She has been married but once and has never been divorced. J. H. Chism's father died July 1, 1851, leaving no father or mother; am not certain whether he left a brother or sister at his death. The mother of J. H. Chism died Feb. 4, 1869. Her maiden name was Martha Cowden, and at her death she left neither father, mother, brother, or sister. The father and mother of J. H. Chism were married but once and left three children surviving them. The family Bible in my possession, containing the records of the deaths, births, and marriages of the members of the Chism family, was left in my mother's possession at my father's death. After my father's death my mother lived with me, and I have had possession of the Bible since my mother's death. I have often seen J. H. Chism write his name. My recollection is that he usually wrote it James Harvey Chism, and he was a rather good penman. I know my brother's history partly from my own personal knowledge, and the rest from the family records and what my parents told me. From my own personal knowledge I know of his enlistment and departure from Texas and of his return home, and of his departure and return the second time to and from Texas, and of his sickness and death. I know the place of his birth from information gotten from my parents; the time of his birth from the family Bible. I know of his going to Texas from the fact that I was at

home when he started. I can only give the time of his return
37 from Texas the second time. It was in November, 1838. I
saw him when he was about to start for Texas both times, and saw him immediately after his return both times. He brought back from Texas on his first return papers showing that he had been a soldier, but I do not recolle*d*t the date of his return. I saw the papers, but do not remember by whom they were signed, but know the name of Chamberlain was on one of them. I do not know the date when the papers were destroyed, but have always been told they were destroyed by fire, which information was gotten from my sister, Mrs. Van Horn. I read the papers myself. My recollection is that, among the papers J. H. Chism brought back from Texas on his second return, one stated that he was entitied to a league of land. I saw these papers while they were in his possession and read them. From the information I had, the papers were destroyed by fire in Texas. I do not recollect by whom they were signed, but remember that the name Chamberlain was on one of them.

Wm. H. Miller testified for plaintiffs, by depositions taken Nov. 6, 1889, as follows:

My age is 78 years; occupation, a manufacturer of tinware, and residence, Brandenburg, Meade county, Ky. I never knew J. H. Chism, but knew Elijah G. Chism and Martha Chism, they being man and wife. They had children, but I cannot say how many. I know that Mary Ann Boling and Martha Ann Van Horn were daughters of theirs, and I have often heard them speak of another sister, Mrs. Evans, who lived in St. Louis. Mary Ann married Wm. W. Boling and Martha married Mr. Van Horn, but I cannot say when, as they had been married before I knew them. Mrs. Boling and Mrs. Van Horn are still married to their first husbands. Elijah G. and Martha Chism lived in Brandenburg, Meade county, Ky., when I knew them. Elijah G. died in July, 1851, and Martha Chism in 1869. I cannot give exact dates. I have never heard of either of them being married more than once. I do not know the exact age of any of their children nor the date of their
38 marriage. I could not say whether J. H. Chism left any
brother or sister who afterwards died.

Martha Ann Van Horn testified, by depositions taken Nov. 13, 1889, for plaintiffs as follows:

My age is 67 years, and residence, St. Louis, Mo., where I have lived about five years. I moved to Mo. about 35 years ago from Ky., where I was born. I knew J. H. Chism, who was my brother, at our home in Ky., from his birth to his death, He died about 1839 at Mudlick Station, Ky., and was buried at Crittenden, Ky. He was, I think, 21 years old when he died. He left no will, to my knowledge, and was never married. His father's name was Elijah G. Chism, and his mother's name was Patsey Chism. Both are dead, and I cannot give exact dates. Neither of them left a will.

J. H. Chism had a brother and three sisters, the brother's name being Isaac Newton Chism and the sisters' Elizabeth Ann, Mary, and deponent. The brother died before J. H. Chism, was unmarried, and left no will, to my knowledge. The three sisters are living; Elizabeth Ann, having married Mr. Evans, lives in St. Louis; Mary, having married Mr. Boling, lives in Brandenburg, Ky.; deponent lives at St. Louis and is a widow. I do not remember the dates of my sisters' marriages; it was a long while ago, and both of them have raised families. I have no family Bible. J. H. Chism was born in Ky., and lived there until he went to Texas. After his absence he returned home and remained there until his death. He enlisted as a soldier in a company made up in Ky. and went to the Republic of Texas. I do not remember the dates when he went. I remember distinctly his coming from Burlington, Ky., and telling his family that he had enlisted, and that all of us felt very much distressed and cried very bitterly. I was at home at the time. He returned from Texas to Ky., where the family were living, but
I do not remember the date. He brought back a paper
39 showing he had been a soldier and his discharge from the
army. This paper was left by him with his mother, and subsequent to his death was turned over by her to deponent's husband. I delivered it with other papers to my son, W. Boon Van Horn, and he took it with him to Dallas, Texas, in order to look up the rights of the heirs with relation to it. He reported to me that his house was burned up in Dallas and this paper with others was burned. This paper stated that J. H. Chism had been honorably discharged. I do not remember by whom it was signed. It stated what rank J. H. Chism held, which I think was first lieutenant. It stated that he had been in the service of the United States; that he had been a soldier of the United States. J. H. Chism returned to Texas after his return home from the army, with the object of entering up the land to which he was entitled. He returned home again some time thereafter, and brought back with him the last time papers showing that he was entitled to land in Texas. It was a land certificate. I do not remember accurately whether the word "league" occurred in that paper, but think it did. When he returned home from Texas the last time he claimed to own land in Texas, and claimed he had sold some land there. He returned home from Texas about twelve months before his death because he was sick. My father took steps towards securing the land, and about 1850 sent one Moreman to Texas to secure the land. He gave Moreman the papers at the time, and I do not remember how soon after that my father died. I know J. H. Chism was a soldier in the Army of the United States, and held, I think, the rank of first lieutenant, from his statement, from the general reputation he bore as such, and by the fact of my having seen the papers issued by the proper authorities which designated him as such. I remember seeing his army discharge among the papers described as having been given by my mother to my husband and by him to me, and by me to W. Boon
Van Horn, and by him taken to Texas and there lost in the
40 fire. The full name of J. H. Chism was James Harvey Chism.

Neither the father or mother of J. H. Chism married a second time after his death; deponent married Wm. M. Van Horn, who died Oct. 13, 1871, and never married again. I was 16 years old when I married. Elizabeth Evans married David B. Evans, who is still living. Her age is about 70 years. She was married but once, and deponent did not remember the date. J. H. Chism was never married. When he died deponent was at Walton, Ky. The brother of J. H. Chism, who died, left no wife or children; was single and unmarried. The father of J. H. Chism left no father or mother, brother or sister, surviving him. The maiden name of the mother of J. H. Chism was Patsey Cowden. She left no father or mother surviving her, and I do not remember whether her brother or sister survived her or not. I have seen J. H. Chism sign his name. It was spelled "Chism." He was rather a good penman. In saying J. H. Chism was born in Ky., lived at home until he went to Texas, and after his absence there returned home and remained there until his death, I answer partly from information and partly from personal knowledge. I was at home during the time referred to and knew of my personal knowledge of his movements while there and of his going from and returning home. My statements concerning his movements while absent from home are based upon information from himself. I do not know at what places in Texas he stopped. I saw him when he was about to start for Texas, and at the time of his return lived across the street from my father and mother and saw him at the time he returned. I cannot state the exact date at which J. H. Chism brought the papers showing his discharge as a soldier from Texas. I saw the paper, but do not remember by whom it was signed. The papers of J. H. Chism, including those just referred to, were delivered by my mother to my husband and by him to me, and by me to W. Boom Van Horn, and by him taken to Texas in order to enable us to recover the land. While
41 in Texas his house was burned and the papers. I was not present at the burning and only knew of it and the loss of the papers from him. My knowledge of the contents of the papers is derived from reading them. I do not remember the exact amount of land the papers which my brother had upon his second return from Texas showed he was entitled to. I saw the papers while in his possession, afterwards in my husband's possession. Subsequently I had possession of them and delivered them to my son, as stated. I read them personally. They have been destroyed, as stated. They were signed, but I do not remember by whom.

MARTHA ANN VAN HORN testified, by depositions taken by plaintiffs on April 1, 1890, as follows:

My age is 67 years. I reside in St. Louis. My depositions have been taken before in this case last fall. My mother's full maiden name was Martha Cowden, and after marriage Martha Chism. My mother was known in the family by the nickname of "Patsey," and was so called by my father. I inadvertently gave the name as "Patsey" in my former depositions instead of Martha, her actual name, as explained. My mother was Martha Chism. Her mother, I think, was born near Georgetown, Ky. I do not remember the date.

THOMAS ROUSE testified, by depositions taken by plaintiffs on Dec. 17, 1889, as follows:

I live in Crittenden, Ky.; am 73 years old and a farmer. About the year 1834 or 1835 I knew J. H. Chism, prior to 1836. He was living at Florence, Ky., or near there. He went to Texas about 1836. I understand J. H. Chism is dead. I could not say positively when he died, but saw him about a year after he left for Texas, and do not think he lived long afterward. J. H. Chism was a carpenter
42 and worked at his trade until he went to Texas about 1836.
His object was to join the Texas army in the contest against Mexico. He went from Florence, Ky., and returned in a year or two after he left. I think his name was James Harvey Chism, and he generally went by the name of Harvey Chism. He was not a married man that I know of. His father's name was Elijah Chism and I do not think I ever knew his mother's given name. I do not know where they are. J. H. Chism had a brother and sisters; the name of the brother was Newton, and he died. I know of three sisters: Elizabeth, who married David Evans and lived in St. Louis the last I heard of her; Martha, who married Wm. Van Horn and was living in Louisiana, Mo., when I last heard of her, and Mary, who first married Pready McManama and afterwards Mr. Boling, and I think moved to Brandenburg, Ky. Elijah Chism was the father of Mary Boling, and Martha was a sister of Mary. When I knew Elijah Chism and his wife they were living at Florence, Ky., or in that neighbourhood. I do not know whether they are living or dead. J. H. Chism was never married and left a father and mother when he died. I do not know when the father and mother were married nor whether or not either of them were married more than once. The names of their children were Newton, Harvey, Elizabeth, Martha, and Mary. I do not know their ages. Newton left neither wife nor children. I do not know whether or not the sisters are dead nor what children they left.

W. BOOM VAN HORN testified, by depositions taken by plaintiffs on Feb. 3, 1890, as follows:

My age is 44 years; residence, St. Louis, Mo.; am employed in the Southern Wire Mill Co. Martha A. Van Horn, plaintiff in this suit, is my mother. About April, 1873, she turned over to me papers relating to the claim of J. H. Chism to land in Texas; she did so at Louisiana, Mo. The character of the papers were
43 a discharge of J. H. Chism, as lieutenant, and a certificate
showing him to be entitled to land in Texas. The papers were destroyed in Dallas, Texas, by fire about 1874. There were three papers—one of them a discharge as stated, another a land certificate, and I am not positive as to what the other was; they related to the honorable discharge of my mother's brother and of his

right to have land in Texas. I do not remember by whom they were signed. I know the papers were in my possession a year, possibly two years. I know I had them more than a year. I inspected said papers quite a number of times and made the inspection in 1874; during the latter part, probably, I showed them to Coln. McCoy, a lawyer in Texas at that time; also to John Henry Brown. Mr. Carroll visited the town and Col. McCoy spoke to him about it, & he came to where I was employed and talked with me about it. No memorandum or description has been furnished me and I testify from memory.

R. M. HALL, Commissioner of the General Land Office of Texas, testified, by deposition taken by plaintiffs on April 4, 1890, as follows:

There are in my custody as Commissioner copies of the muster-roll of the Texas army of 1835 and 1836. They became archives of the General Land Office in accordance with acts of the legislature of Texas, passed January 16, 1858, December 15, 1859, and February 7, 1860. They were turned over to this office by the commissioner of claims on January 1, 1862. On page 121 of said muster-roll a name appears which may be taken for J. H. Chism, but the name Chism greatly resembles the name Chison, the "o" being open at the top, and wherever the letter o is made on said rolls in the same handwriting it is made to close at the top. While the name looks as much like Chison as Chism, I believe it is intended for Chism from all the data that can be found in this office, among which is the fact that J. H. Chison did not receive a bounty warrant for service in the army of Texas, and J. H. Chism did receive one as lieutenant in the army.
44 J. H. Chison, or Chism, appears from said rolls to have been first lieutenant of Company A, Capt. Clark L. Owen, First Regiment Permanent Vols., James H. Chism, or Chison, and C. Colley being lieutenants. These rolls show that he enlisted June 14th, 1836. They do not show the duration of his service, but the bounty warrant issued to J. H. Chism shows that he served in the army of Texas from December 16, 1836, to May 27, 1837. The name of Ch*is*m appears twice upon said muster-rolls, if it is conceded that the name above mentioned is Chism and not Chison, once with the initial "J. H." and once with the initial "E. P." The name Chrisholm appears on said muster-rolls with the initial "R." (Richard)—a head-right certificate issued under the authority of the Republic of Texas to J. H. Chism. There *are* no transfer of said certificate on file in the General Land Office. Its No. is 990. It was issued for one-third of a league. It was located and patented. It appears to have been located by J. M. Steiner in Hill county. The file and entry is not dated or signed by any one. The survey was made July 11, 1857. It was patented on the 17th March, 1858, to J. H. Chism. The name of Wm. R. Baker does not appear anywhere in connection with said certificate, nor the file which covers it. A bounty certificate issued under the authority of the Republic

of Texas to J. H. Chism. A transfer of said certificate, signed by J. H. Chism, appears in the file. I attach a certified copy of said transfer. It is as follows:

"REPUBLIC OF TEXAS, }
County of Harrisburg. }

Be it known that this day, before me, John Alexander Newlands, a notary public for the county aforesaid, duly commissioned and qualified, personally appeared the citizen J. H. Chism, who declared that for and in consideration of the sum of five hundred dollars to him in hand paid by R. B. Dobbins, the receipt of which is
hereby acknowledged, he has this day granted, bargained,
45 sold, alienated, conveyed, and confirmed, and by these pres-
ents doth grant, bargain, sell, alien, convey, confirm, unto
said R. B. Dobbins, his heirs and assigns, a certificate containing twelve hundred and eighty acres of bounty land, granted to him by the Secretary of War on the fifteenth day of September, one thousand eight hundred and thirty-eight, for services rendered the Government from the 16th day of December, 1836, until the 27th day of May, 1837, as appears by said certificate No. 4298 hereon annexed; to have and to hold said certificate of bounty land to him, the said R. B. Dobbins, his heirs and assigns forever; and he, the said J. H. Chism, for himself, his heirs and assigns, the said bargained certificate, with all the rights thereunto belonging, to the said J. H. Chism, his heirs and assigns, shall and will warrant — forever defend against the claims of all persons whatsoever.

In testimony whereof he hath hereunto fixed his name and seal, in the presence of J. G. Hutchison and James L. Eubanks, witnesses of lawful age, and me, the said notary, at the city of Houston, this thirty-first day of October, 1838.

J. H. CHISM. [SEAL.]

Witnesses:
J. G. HUTCHISON.
JAMES L. EUBANKS."

To the introduction of the aforesaid transfer in evidence the defendant objected because the facts that J. H. Chism signed his name — one occasion "J. H. Chism" did not show nor tend to show that he did not on another occasion sign his name "J. H. Chisholm," the names being *idem sonans*, and said evidence did not tend to elucidate any issue in this case, and was hence immaterial and irrelevant; which objection the court overruled and admitted the testimony so objected to; to which ruling of the court the defendant then and there excepted and still excepts, and asks that the same
be allowed as exception No. 1 and enrolled as such in this
46 bill of exceptions, which is accordingly done. The evidence
showed that only two certificates issued to J. H. Chism,
one for one-third league, now in controversy, and the one for 1,280 acres, of which this was the transfer. This transfer was offered in evidence to corroborate witness M. A. Van Horn to the effect that J. H. Chism claimed to have sold land in Texas, to show that it was

the 1,280 acres he had sold; also to show the price at which it was sold, the date of sale, and that he signed his name "J. H. Chism."

There are among the papers in the general land office of Texas the clerk's return for Harrisburg county, showing what land certificates were issued by the board of land commissioners of Harrisburg land district. Said returns show a 2nd-class land certificate was issued by said board to J. H. Chism; clerk's return No. 11 contains a report of said certificate, describing it as certificate No. 990 for ⅓ of a league of land, issued November, 1838, to J. H. Chism; date of emigration, August, 1836; said returns do not show that any 2nd-class certificate ever issued to J. H. Chisholm; there are among the books and papers of the general land office of Texas the original of the report of the travelling board provided for by act of Congress of the Republic of Texas of Jan. 29, 1840, to detect fraudulent land certificates and to provide for issuing patents to legal claimants; said report was made June 25, 1841, and was received in the general land office July 14, 1841; said report alludes to a 2nd-class certificate issued by the board of land commissioners of Harrisburg land district to J. H. Chisholm, and it is described as No. 701, date Nov. 1, 1838, and quality ⅓ of a league; said report does not allude to any 2nd-class certificate issued by said board to J. H. Chism; the records of my office show that said certificate No. 990, with field-notes, was filed in this office by J. M. Steiner
47 on Jan. 2, 1858; the file or entry on file bears no date and is not signed by any one, but, J. M. Steiner having returned said certificate and field-notes, it is believed that he was the locator; the survey was made, as shown by the field-notes, on July 11, 1857; the records show the patent was delivered to J. M. Steiner April 2, 1858; there is what was known as an application book in said office, and its purpose was for easy reference to claims filed in the office and to ascertain by whom and when filed; application book No. 4 by its entries shows that on Jan. 2, 1858, J. M. Steiner deposited in the general land office certificate No. 990 for ⅓ of a league of land, issued to J. H. Chism, and that said certificate, with field-notes, was placed in file 518, Robertson 2nd class, and patented.

Plaintiffs read in evidence a certified copy of the following military voucher or certificate, the original being an archive of the comptroller's office of the State of Texas, as follows:

1733.

CITY OF HOUSTON, *June* 3, 1837.

I hereby certify that J. H. Chism was elected first lieutenant of Company (A), Permanent Volunteers, on the sixteenth day of December, one thousand eight hundred and thirty-six, and has acted in that capacity up to the date of his resignation on the 27th May, 1837.

FELIX HUSTIN,
Brig. Gen'l, C.

Approved:
J. SNIVELY,
Acting Sec. of War.

I hereby certify that Jas. H. Chism served in Capt. Rogers' Com'y, 1st Reg. Ky. Vols., as second sergeant from the 12 day of
48 June, 1836, to the first day of Octo., 1836, and that he acted as orderly sergeant to the company from the first day of October to the 15th day of December, and was in full command of the company for the space of one month.

Camp Johnson, Lo Buece Ren., Dec. 18, 1836.

C. S. OWEN,
Lieut. Com'd'g.
JAS. H. D. ROGERS, *Capt.*

Approved:
J. SNIVELY,
Acting Sec'y of War.

AUDITOR'S OFFICE, HOUSTON, *June 5th*, 1837.

This day came James H. Chism and says that the annexed instrument is just, true, and original; that he owes the Government nothing on his own account or on account of any other person, nor has he retained any arms, munitions of war, or any other property whatever belonging to the Republic of Texas or caused the same to have been done.

Sworn to before—

J. W. MOODY, *Auditor.*

Endorsements: 1733. $421.62. J. H. Chism. Filed 5 June, 1837. Examined same day. Admitted to audit for $421.62. Military. J. W. Moody, auditor, 12 June, 1836; 1st June, 1837. No. draft, 2214. W. Amount due me from Government, $90.50 *$90.50.*

Plaintiffs proved by two witnesses—Joseph L. White and another—that the rental value of said land, regardless of improvements, for the seven years before suit was filed was from three to four cents per acre per year, except for the last two years, when
49 it had been worth some five or six cents per acre per year.

The defendants read in evidence the certificate and patent read by plaintiffs and a certified copy taken from the records of Harris county, Texas, of a transfer, which read as follows:

Know all men by these presents that I, J. H. Chism, for the sum of one hundred and fifty dollars to me paid by E. M. Robinson, do hereby sell, transfer, and convey to the said Robinson, his heirs and assigns forever, my head-right for one-third of a league of land, No. —, dated November, 1838, issued by the board of land commissioners for Harrisburg county, together with the land upon which the same may be located; to have and to hold the same to him, the said Robinson, his heirs and assigns forever, and I agree to warrant and defend the said claim against all claims whatsoever.

Witness my hand and seal, at Houston, December 2nd, 1838.

J. H. ~~CHISM~~. [SEAL.]
Chisholm

Witnesses:
GEORGE W. LIVELY.
J. A. SOUTHMAYD.

REPUBLIC OF TEXAS,
County of Harrisburg.

Before me, Andrew Briscoe, chief justice of Harrisburg county, came J. H. Chisholm, the grantor above, and acknowledged to me that he signed and executed the foregoing deed for the uses and purposes therein contained; to certify which I have hereunto set my hand and seal of the county, at Houston, Dec. 2nd, 1838.

A. BRISCOE,
Chief Justice.

[SEAL.]

Recorded October 27, 1852, at 9 o'clock a. m.

W. R. BAKER, *Clerk.*

THE STATE OF TEXAS,
County of Harris.

I, Alex. Erichson, clerk of the county court in and for the county and State aforesaid, do hereby certify that the above and foregoing is a true and correct copy of the conveyance of one-third of a league
of land from J. H. Chisholm to E. M. Robinson, as the same
50 appears of record in my office, in Harris Co. Record of Book
R, page 224.

Witness Alex. Erichson, clerk of said court, and the seal thereof, at office, in the city of Houston, this 23rd day of July, 1888.

ALEX. ERICHSON,
Clerk County Court, Harris County, Texas,
By ALEX. B. ATTLINGSCH,
Deputy Clerk. [SEAL.]

The foregoing instrument was recorded in Hill county, Texas' July 25th, 1888.

The defendant read in evidence the depositions of W. R. BAKER, taken at the instance of plaintiffs on December 24, 1889, and as follows:

My name is W. R. Baker. I am 69 years old; have lived in Houston, Texas, 51 years; was clerk of the county court of Harris county from February, 1841, to July, 1856. I have seen the original instrument of which the foregoing transfer from J. H. Chisholm to E. M. Robinson purports to be a copy. I first saw it about the time of its date, in the latter part of the year 1838. I last saw it about 1856. It was in my possession. It has been lost. I sent it by mail to J. De Cordova, and he -ever reported that it had never come to hand. I saw the original certificate which transfer purports to convey. I saw it when it was purchased. It was in the hands of the grantee. It was delivered to me for Robinson. I do not remember whether I wrote the deed or Judge Briscoe, the notary. The subscribing witness, Geo. W. Lively, removed to Georgia from here about 1850, and was reported dead several years since. The surviving witness, J. A. Southmayd, removed to California in 1849, and died about eight years later. I heard of Lively's death, I think, before the war. Briscoe is dead. I think he died before 1860.

Robinson was living when I last heard of him—say three years since. He lived in the State of New York. He was not a Texas, and never lived in Texas. He lived at times at Watertown and Oswego. He was about 25 years old. He was a slim man, 5
51 feet 10 inches in height, dark complected, hair and eyes, and weighed about 145 lbs. He had no relatives but myself. I was his cousin. No one in Texas except myself and family knew him. I know of no person who knew the grantor in this instrument. I knew the transfer from J. H. Chisholm to E. M. Robinson at its date. I was present when it was executed. I have not the original. I have no memory specially of the man who executed the instrument. I bought the certificate and paid him for it. I knew the man in Houston. I had no acquaintance with him. I was buying land certificates from others as well as this. The soldiers of the Texas army had been discharged in Houston, and they had their bounty lands and head-right certificates issued to them. Mr. Chisholm appeared to have been a soldier, and had a head-right certificate which indicated that he was a soldier. I do not know whether he was a native of Texas or from what county or State he came or what was the place of his birth or when he came to Texas. I knew him only in Houston, and do not remember the length of the acquaintance. I do not remember when and where I first saw him or last saw him, nor how old a man, nor can I recall his personal appearance. It is over 50 years ago, and I do not remember nor do I know, when I last saw him, what he was doing, nor where he was going, nor what was the condition of his health, nor what finally became of him, nor whether he is alive or dead, nor what relations he had, nor whether he was a single or married man. I only knew his name from the way he signed it. I was living at the time in Houston, and I was clerk for the city company. I do not know the names or addresses of any person now living who knew him; have examined the certified copy attached to interrogatories of the instrument which reads as follows:

I, Edward M. Robinson, a citizen of the State of New York, do, by this act, declare and make known that for reasons deemed by
52 me sufficient I have nominated and appointed, and by this act nominate and appoint, William R. Baker, of the city of Houston, in the State of Texas, my true and lawful agent and attorney-in-fact for me and in my name and stead, at any time and for any consideration or considerations by him deemed sufficient, to grant, bargain, sell, and convey all my right, title, interest in and to any and all lots or lands in the corporate limits of the city of Houston or county of Harris, State of Texas, to which I have any title or claim, and to make any transfer or conveyance by signing my name and affixing my seal which may be necessary to quitclaim all my title or rights therein, and all such acts of my said attorney-in-fact I will forever ratify and confirm.

Witness my hand and *scrawl* for seal this twenty-eighth day of August, A. D. 1848. The words "State of" interlined before signing.

E. M. ROBINSON. [SEAL.]

Witnesses:
THO. M. BAGBY.
SILAS WALLACE.
GEO. W. ROBINSON.

STATE OF TEXAS,
Harris County.

Before me, William N. Lyon, a notary public in and for the county aforesaid, personally appeared Tho. M. Bagby, one of the subscribing witnesses to the foregoing power of attorney, who upon oath declared that he saw E. M. Robinson sign, seal, and deliver the same for the uses and purposes therein mentioned, with the interlineation of "State of," and that he signed the same as witness at the request of said Robinson.

Given under my hand and the impress of my official seal, at the city of Houston, this the fifteenth day of December, A. D. 1848.

WM. N. LYON,
Notary Public, Harris County.

53 Filed Oct. 7, 1852, at 9 o'clock a. m., and recorded on Harris County Record of Deeds Book 2, page 193.

Witness my hand and seal of Harris county court, at office, in Houston.

W. R. BAKER, *Clerk.*

Filed Feb'y 17th, 1860, at 8 o'clock a. m., and recorded on Leon County Record of Deeds Book F, page 409.

Witness my hand and the Leon county court seal, at office, in Centreville.

HENRY D. PATRICK,
Clerk County Court, Leon County.

THE STATE OF TEXAS,
County of Erath.

This is to certify that the within was filed for record Nov. 2, 1870, at 10 o'clock a. m., and was recorded the same day at 3 o'clock p. m. in Book B, page- 113 & 114.

Witness my hand and seal — office at Stephensville.

G. W. GENTRY,
Clerk D. C. C. C., Texas.

STATE OF TEXAS,
Limestone County.

I hereby certify that the foregoing attached power of attorney and certificates of authenti*fi*cation and record from E. M. Robinson to William R. Baker was filed for record in my office on the 9th day of January, A. D. 1877, at 9 one-half o'clock a. m., and was duly recorded on the 10th day of January, A. D. 1877, at 9 o'clock a. m., in Record Book "F," records of deeds, pages 458 and 459.

Given under my hand and seal of office this the 10th day of January, A. D. 1877.

S. D. WALKER,
County Clerk, Limestone County.

STATE OF TEXAS,
County of Eastland.

54 I, A. J. Stuart, clerk of the county court in and for said county, do hereby certify that the foregoing instrument of writing was duly and correctly recorded in my office on the 14th day of November, 1878, at 8 o'clock p. m., in Record Book D, page 4.

In witness whereof I hereunto sign my name and affix the seal of said court, at office, in Eastland, this 14th day of November, 1878.

A. J. STUART,
Clerk of County Court, Eastland County, Texas.

THE STATE OF TEXAS,
County of Navarro.

I hereby cer-ify that the foregoing instrument of writing, with its certificates of authentication, was filed for record in my office at 2 o'clock p. m., May 7, 1887, and duly recorded at 4 o'clock p. m., May 9, 1887, in vol. 52, pages 583 and 584, of the Deeds Records of Navarro County, Texas.

Witness my hand and seal of office this 9th day of May, A. D. 1887.

B. H. WOODS,
Clerk County Court, Navarro Co., Tex.,
By B. H. WOODS, JR., *Deputy.*

STATE OF TEXAS,
County of Bosque.

I, H. C. Cooke, clerk of the county court within and for said county, do hereby certify that the foregoing instrument was filed in my office for record at 2 o'clock p. m. on the 8th day of July, 1887, and was correctly recorded on the 9 day of July, 1887, in Deed Record Book, vol. 7, on pages 458–'61.

Given under my hand and seal of office this 9th day of July, 1887.

H. C. COOKE,
Clerk County Court, Bosque County, Texas,
By J. L. ROGERS, *Deputy.*

THE STATE OF TEXAS,
County of Hill.

55 I, W. W. Wright, clerk of the county court of said county, do hereby certify that the foregoing instrument of writing, with its certificates of authenti*f*ication, was filed for record in my office this 2nd day of December, A. D. 1887, at 5 o'clock p. m., and

duly recorded the 3rd day of December, A. D. 1887, at 10.15 o'clock a. m., in the Deed Records of said county, in volume 19, on pages 75, 76, & 77.

Witness my hand and seal of county court of said county, at office, in Hillsboro', the day and year last above written.

W. W. WRIGHT,
Clerk County Court, Hill County, Texas,
By CHAS. M. MOORE, *Deputy.*

The subscribing witnesses and notary are all dead; subscribing witness Bagby died in 1868; subscribing witness Wallace died about 1860; subscribing witness Robinson died about 1875; Lyon, the notary public who took the acknowledgement, died about 1857. I wrote the original of this instrument; have examined the certified copy attached to interrogatories of the instrument, which is as follows:

THE STATE OF TEXAS, }
Harris County. }

Know all men by this public instrument, made and entered into by and between Edward M. Robinson of the county of —— in the State of New York of the first part, and J. De Cordova of the county of Harris in the State of Texas of the second part, witnesseth, that for and in consideration of the sum of three thousand dollars in hand paid by the party of the second part to the party of the first part, the receipt whereof is hereby fully acknowledged and confessed, the said party of the first part, by this act has granted, bargained, sold conveyed and released, and doth hereby grant bargain, sell, convey, and release unto the said party of the second part, his heirs assigns and legal representatives, the following-described
56 land: Certificates, to wit a bond for 640 acres. Richard I. Beach 640 acres, David Anderson 640 acres, Geo. Pembleton 640 acres, F. Bartholime 640 acres, I. R. Herper 320 acres, Antonio Schmidt 320 acres, Jno. Harrington one-third of a league, Wm. Murray one-third of a league, Joshua Hudson for 640 acres, Chas. Morgan 640 acres, Jno. Christopher one-third of a league, Rich'd Hazard for 640 acres, E. Goodsir for 640 acres, Rich'd Walton for 640 acres, Rob't Hall 640 acres, Wm. Bush for 640 acres, Jno. House for 1,280 acres, Jno. Hayman for 1,280 acres, J. B. M. Clain for one-third of a league, J. H. Chisholm for one-third of a league, Walter Wade for 1,280 acres, A. Bradly for 640 acres, Wm. Booth for 640 acres, Jno. Rahm for 640 acres, Oscar Davis 640 acres, Jas. E. Gibbins 640 acres, Jno. Woodward 640 acres, T. A. Sully 640 acres, Allen Reaves 640 acres, Jno. Hameridy 640 acres. Together with all the rights, members, improvements, hereditaments appurtenances to the same belonging, or in anywise incident or appertaining, and the reversions and remainders, rents, issues and profits thereof. To have and to hold all and singular the premises and hereditaments above mentioned and hereby and herein granted, with the appurtenances thereto belonging, to the said party of the second part, his heirs and assigns to the only proper use and behoof

of the said party of the second part, his heirs and assigns forever. And the said party of the first part by this act binds himself his heirs, executors and administrators to warrant and forever defend all and singular the said hereinbefore-described premises unto the said party of the second part, his heirs and assigns, against any person or persons lawfully claiming or to claim the same *the same*, or any part thereof, by or through the party of the first part.

In witness of all which, the party of the first part hereunto sets his hand and seal (using scroll for seal) at Houston, this fourth day of Nov. in the year of our Lord one thousand eight
57 hundred and fifty-six.

E. M. ROBINSON, [SEAL.]
By W. R. BAKER, *Att'y-in-fact.*

STATE OF TEXAS,
Harris County.

Before me, August C. Davis, a notary public of Harris county, in the State of Texas, duly commissioned and qualified, this day came and personally appeared E. M. Robinson, of New York, by att'y-in-fact, W. R. Baker, of the county of Harris, to me personally known, who acknowledged the execution of the foregoing deed, dated 4th day of November, A. D. 1856, and delivered the same as his binding act and deed for the purposes and considerations therein contained and at length set forth.

[SEAL.] Given under my hand and official seal, at my office, in Houston, this fourth day of November, A. D. one thousand and eight hundred and fifty-six.

AUG. C. DAVIS,
Notary Public, Harris Co.

Filed July 4, 1859, at 9 o'clock a. m., and recorded on Harris County Record of Deeds Book U, page 621.

Witness my hand and seal of Harris county court.

J. B. DART, *Clerk,*
By J. BRASHEAR, *D'p'y.*

Filed Feb'y 17, 1860, at 8 o'clock a. m., and recorded on Leon County Record of Deeds Book F, pages 409, 410, & 411.

[SEAL.] Witness my hand and the Leon county court seal, at office, in my office, at Centreville.

HENRY D. PATRICK, *D. Clerk.*

THE STATE OF TEXAS,
County of Erath.

58 This is to certify that the within instrument was filed in my office for record Nov. 2, at 10 o'clock, 1870, a. m., and was correctly recorded the same day and hour in Book B, pages 114 & '15.

Witness my hand and seal of office at Stephenville; date last above written.

G. W. GENTRY,
Clerk D. C. E. F.

STATE OF TEXAS, }
Limestone County, } *ss:*

I hereby certify that the foregoing and attached deed and certificate of acknowledgment and record from E. M. Robinson to J. De Cordova was filed for record in my office on the 9th day of January, A. D. 1877, at 9 one-half o'clock a. m., and was duly recorded on the same day of January, A. D. 1877, at 3 o'clock p. m., in Record Book F, records of deeds, pages 454, 455, & 456.

[SEAL.] Given under my hand and seal of office this 9th day of January, A. D. 1877.

S. D. WALKER,
County Clerk, Limestone County.

STATE OF TEXAS, }
County of Eastland. }

I, Ike P. Schmick, clerk of the county court in and for said county, do hereby certify that the foregoing instrument was duly and correctly recorded in my office on the 10th day of December, 1878, at 11 o'clock a. m., in Record Book D, page- 43, 44, 45.

In witness whereof I hereunto sign my name and affix the seal of the said court, at office, in Eastland, this 10th day of December, 1878.

[SEAL.]

IKE P. SCHMICK,
Clerk of County Court, Eastland Co., Texas,
By R. B. TRULY, *Deputy.*

THE STATE OF TEXAS, }
County of Hill. }

59 I, W. W. Wright, clerk of the county court of said county, do certify that the foregoing instrument of writing, with its certificate of authentication, was filed for record in my office this 19th day of July, A. D. 1888, at 5 o'clock p. m., and duly recorded the 20th day of July, 1888, at 3.30 o'clock p. m., in the Deed Records of said county, in volume 20, on pages 526 & 527.

Witness my hand and seal of county court of said county, at office, in Hillsboro', the day and year last above written.

W. W. WRIGHT,
Clerk Co. Court, Hill Co., Texas,
By CHAS. M. MOORE, *Deputy.*

At the time the original of this instrument was executed the land certificate alluded to in same as "J. H. Chisholm for ¼ of a league" had, I think, been given to J. De Cordova by me; do not know, but think it had been given to him by me some time before; do not know when the land certificate was delivered to J. De Cordova, but it was before the date of said instrument, and by me, I suppose, as I had possession of it and gave several certificates to him for location; believe the transfer was written by me, and I suppose at its date. J. De Cordova died in 1869; have examined the certified copy attached to interrogatories of an instrument which reads as follows:

THE STATE OF TEXAS,
Harris County.

Know all men by this public instrument, made and entered into by and between Jacob De Cordova of the county of Guadalupe in the State of Texas of the first part, and William R. Baker of the county of Harris in the State aforesaid of the second part witnesseth:

That for and in consideration of the sum of four thousand dollars in hand paid by the party of the second part to the party of the first part, the receipt of which is hereby fully acknowledged and confessed, the said party of the first part, by this act, has granted, bargained, sold, conveyed and released, and doth hereby grant, bargain sell convey and release unto the said party of the second part,
his heirs assigns and legal representatives the following-
60 described land certificates, and the land located by virtue
thereof, to wit Alex. Bond for 640 acres, Rich'd Beach 640 acres, David Anderson 640 acres, F. Bartholime 640 acres, J. R. Herper 320 acres, Antonio Schmidt 320 acres, John Harrington one-third of a league, John Christopher one-third of a league, Joshua Hudson for 640 acres, Richard Hazard for 640 acres, E. Goodsir for 640 acres, Chas. Morgan 640 acres, Rich'd Walton for 640 acres, Rob't Hall for 640 acres, Wm. Bush for 640 acres, Jno. Hayman for 1,280 acres, J. B. M. Clain for one-third of a league, J. H. Chisholm for one-third of a league, Jno. House for 1,280 acres, Walker Wade for 1,280 acres, A. Bradly for 640 acres, Wm. Booth for 640 acres, Jno. Rahm for 640 acres, Oscar Davis 640 acres, Jas. E. Gibbins for 640 acres, Jno. Woodward for 640 acres, T. A. Sully for 640 acres, Allen Reaves 640 acres, Jno. Hameridge for 640 acres, the same purchased by me from E. M. Robinson. Together with all and singular the rights and members, improvements, hereditaments and appurtenances to the same belonging or in anywise incident or appertaining, and the reversions and remainders rents, issues and profits thereof. To have and to hold all and singular the premises aad hereditaments above mentioned and hereby and herein granted, with the appurtenances thereto belonging, to the said party of the second part, his heirs, assigns, to the only proper use and behoof of the said party of the second part, his heirs and assigns forever. And the said party of the first part by this act binds himself his heirs executors, and administrators to warrant and forever defend all and singular the said hereinbefore-described premises unto the said party of the second part, his heirs and assigns, against every person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, by through or under the party of the first part only.

In witness of all which, the party of the first part here-
61 unto sets his hand and seal (using scroll for seal) at Houston,
this tenth day of May in the year of our Lord one thousand eight hundred and fifty-seven (1857).

J. DE CORDOVA. [L. S.]

THE STATE OF TEXAS, }
Harris County. }

Before me, A. C. Daws, a notary public of Harris county, in the State of Texas, duly commissioned and qualified, this day came and personally appeared Jacob De Cordova, of the county of Harris, to me personally known, who acknowledged the execution of the foregoing deed, dated 10th day of May, A. D. 1857, and delivered the same as his binding act and deed for the purposes and consideration therein contained and at length set forth.

Given under my hand and official seal, at my office, in the city of Houston, this tenth day of May, A. D. one thousand eight hundred and fifty-seven.

[SEAL.]

A. C. DAWS,
Notary Public, Harris Co.

Filed January 4th, 1859, at 9 o'clock a. m. and recorded on Harris County Record of Deeds Book U, page 622.

Witness my hand and seal of Harris county court.

J. B. DART, *Clerk,*
By J. BRASHEAR, *Deputy.*

Filed February 17, 1860, at 8 o'clock a. m. and recorded on Leon County Record of Deeds, &c., Book F, pages 411 & 412.

Witness my hand and the Leon county court seal, at office, in the town of Centreville.

HENRY D. PATRICK,
Clerk Co. Ct., Leon Co.

STATE OF TEXAS, }
County of Eastland. }

I, A. J. Stuart, clerk of the county court in and for said county, do hereby certify that the foregoing instrument of writing was duly and correctly recorded in my office, on the 14th day of November, 1878, at — o'clock — m., in Record Book D, pages 2
62 & 3.

In witness whereof I hereunto sign my name and affix the seal of said court, at office, in Eastland, this 14th day of November, 1878.

A. J. STUART,
Clerk of County Court, Eastland Co., Texas.

STATE OF TEXAS, } *ss:*
Limestone County, }

I hereby certify that the foregoing attached deed and certificates of acknowledgement and record from J. De Cordova to W. R. Baker *was* filed for record in my office on the 9th day of January, A. D. 1877, at 9 one-half o'clock a. m., and was duly recorded on the same day of January, A. D. 1877, at 5 o'clock p. m., in Record Book F, record of deeds, pages 456, 457, & 458.

Given under my hand and seal of office this the 9th day of January, A. D. 1877.

[SEAL.] S. D. WALKER,
County Clerk, Limestone County.

STATE OF TEXAS,
County of Hill.

I, W. W. Wright, clerk of the county court of said county, do certify that the foregoing instrument of writing, with its certificate of authentification, was filed for record in my office this 19th day of July, A. D. 1888, at 5 o'clock p. m., and duly recorded the 20th day of July, 1888, at 4.45 o'clock p. m., in the deed records of said county, in volume 20, on pages 527 & 528.

Witness my hand and seal of county court of said county, at office, in Hillsboro', the day and year last above written.

[SEAL.] W. W. WRIGHT,
Clerk County Court, Hill County, Texas,
By CHAS. M. MOORE, *Deputy.*

I suppose the original was executed at its date and written by me; do not know where the land certificate alluded to as "J. H. 63 Chisholm for $\frac{1}{3}$ of a league" was at the time, but suppose it was in the hand of De Cordova. I presume it was not delivered to me at the time this transfer was executed; it was delivered to me when I bought it for Robinson. I presume I first saw said land certificate when I bought it. I claimed to own this certificate by virtue of the transfer from J. H. Chisholm to E. M. Robinson, by Robinson, by attorney-in-fact, to J. De Cordova, and by him to me, and I sold it to J. L. White and —— White. I presume the county record of deeds of Harris county contains a correct record of the original instrument, signed "J. H. Chisholm," being a transfer to E. M. Robinson, as above set out. I knew a man named J. H. Chisholm, and his name was pronounced as if spelled "Chism" or "Chisum." He represented that was his name and had a land certificate in that name, recently issued by the board of land commissioners of Harrisburg county; do not know that I had any acquaintance or knowledge of him beyond this transaction. He represented that he had been serving in the army, and I have an indistinct memory that I called his attention to the discrepancy or difference in spelling the name and that the explanation was that some people spelled it as it was pronounced, according to sound. So many years have elapsed, over fifty, since these transactions that I am not certain of minor details. I knew E. M. Robinson; have known him all my life. He was a harness manufacturer. He is the same who executed a power of attorney to me as above set out. He owned property in Harris county. I am the same Baker who, on or about May 20, 1882, executed a deed conveying to Geo. G. & Jos. L. White the land involved in this suit, viz., the $\frac{1}{3}$ league of land in Hill county, Texas, patented to "J. H. Chism."

The defendant read in evidence the following depositions of WILLIAM R. BAKER, taken by defendant on April 18th, 1890:

I saw the original certificate. It was issued to J. H. Chism for one-third of a league of land. (This is the certificate a copy 64 of which plaintiffs and defendant offered as above in evidence). First, in December, 1838, when I bought it. I last saw it about two weeks since. It was in my possession when I bought it in December, 1838. On purchasing it it was delivered to me by the grantee. It remained in my possession for several years and until I delivered it for location. I think now, after examining my old papers, that I gave it out first to Jacob De Cordova for location, as he did nearly all of my business in selecting and locating land, which was a large amount. In such examination my memory is refreshed in that meeting with Dr. J. M. Steiner in about 1857, who was then a surgeon in the army stationed on the frontier at either Fort Graham or Fenton Hill. He solicited land certificates for location, representing to me that he had unusual facilities for personally examining lands and that I could depend upon good selections for that reason, and because he would only perform the services for a portion of the lands, as well as others, and I either had it in my possession to give him or directed De Cordova to give it to him. I saw the original certificate in the General Land Office about three weeks since, and I recognized it in that it is in the form, style, and print of the certificates used by the board of land commissioners of Harrisburg county at its date, with which I was familiar, being then in the daily habit of attending the settings of the board and purchasing land certificates which were offered for sale, and the signatures to the said certificates, to wit, J. G. Hutchinson and John Woodruff, commissioners, and Thomas William Ward, clerk, are all genuine, and I often saw them write. I delivered to J. M. Steiner this certificate for the purpose of location, and I have two letters from J. M. Steiner, written by him, and referring to this certificate under dates of August 29th, 1860, and impress copies of two letters to me from him under dates of April 27th, 1860, and September 7th, 1860. 65 I know the handwriting of J. M. Steiner and his signature, having seen him write and from lengthy correspondence with him. Steiner has been dead for several years.

The witness here attaches the two letters referred to from Steiner, the former of which is dated Austin, August 29th, 1860, in which he informs Baker that he some time ago forwarded the Chism 1,476-acre claim or a patent therefor, and in which he recites the following as the tracts to be divided between himself for locative services and Baker, to wit: Chism ⅓ league, 1,476 acres; Webb, 640 acres; Harrison, 640 acres; Watson, 640 acres. In letter of July 22nd, 1861, J. M. Steiner writes to W. R. Baker as follows, among other things: "My dear sir: Since our settlement at Houston I have in addition to the John Gibson claim, which was due you, sent the following, J. H. Chism, 1,476 acres;" and then follows a reference to other claims and patents. In the answer of Baker to Steiner Baker writes with reference to the locative services performed by

Steiner for him and under date of September 17, 1860, writes as follows: "According to your statement our land matters stand as follows: I. O. U. for location the J. H. Chism, 1,476 acres; David Harrison, 640 acres; Chas. Watson, 640 acres; ⅓ for your share, 2,756—total, 918⅔ acres."

I believe that I delivered the land certificate, by virtue of which the land in controversy was located, to J. De Cordova before the transfer from E. M. Robinson to him of date Nov., 1856, and that he returned it to me at the time he conveyed it back to me in 1857 or at my instance delivered it to Steiner for me. I believe the foregoing statement to be correct. Since my answers to plaintiffs' interrogatories have examined very thoroughly my papers and memoranda of 1856 to 1860, and a- convinced that the above answer is more accurate than when given previously. The land certificate alluded to in the transfer from Robinson, by att'y-in-fact, W. R.
Baker, to De Cordova, and from De Cordova to W. R. Baker,
66 as "J. H. Chisholm, ⅓ league," is the same one as that de-
scribed in instrument signed J. H. Chisholm and made to E.
M. Robinson. I did, during the latter part of March, 1890, make and examination of the records of the general land office of the State of Texas, in Austin, Texas, relating to the J. H. Chism certificate, and took out and examined the file of said certificate and the endorsements thereon. In Oct., 1889, in Houston, Texas, I did answer certain interrogatories propounded to me by plaintiffs in this case. I was informed that those interrogatories would be taken a few days, perhaps a week, before they were taken. W. Chas. Ashe, the notary who took my answers to those interrogatories, called on me to answer the interrogatories. After reading them I told him I could not answer some of them accurately and satisfactorily without some documents, especially the chain of title papers which I had sent to another county for record, as they embraced other lands besides the Chism tract; that I had anticipated I would be called on to answer interrogatories in this case and had written to have the papers or deeds returned to me immediately; that I expected them within three days, and that, if there was necessity for haste, that I would answer at the end of that time, and that, if I did not get them in time, I would answer them as best I could. He left me under the impression that that arrangement would do. The next day I was astonished by the service of a subpœna. I think it was peremptory to appear and answer either immediately or at some stated hour of that day. I went to his office twice that day and did not find him in. The next morning found him and asked an explanation. He said that he could not help it; that he had received strict instructions from plaintiffs' attorneys to allow no delays. I proceeded to answer as he required, and by reference to my answers it will be found that I state, in relation to my desire for time to get the docu-
ments, I wanted of three days' time to answer properly and
67 accurately the interrogatories; that the officer taking my
answers refused any delay and demanded my immediate
answers. I kept all of my appointments. I was subpœn-ed and obeyed it without delay. Ashe was gentlemanly with me and never

threatened me with anything nor had any occasion to do so. I never indicated any or had any disposition to avoid answering; I only wanted opportunity to get information so as to be accurate. I did ask Lawrence, a land agent in Austin, Texas, for information that I thought existed in the land and adjutant general's offices about the Chism claim, and I got his reply before I was called to answer interrogatories, and was not waiting at all on him. I do not remember exactly what I stated to Lawrence except that I had bought the Chisholm certificate, and the patent — had issued spelled it "Chism," and I wanted to investigate the offices for an explanation if possible. When I heard I was to be made a party of this suit, and before I was made a party and before I had any notice that I would be interrogated, I applied to Lawrence for information and received his reply, but a few days intervened from the time I heard that interrogatories would be propounded me until they were served.

I sold the land in question to Geo. G. & J. L. White for $3,690, and executed the usual warrantee deed.

Defendants next introduced a chain of title as follows:

Original power of attorney from E. M. Robinson to William R. Baker, a copy of which appears in Baker's testimony, pages 24 & 25, dated August 28th, 1848, authorizing Baker to convey the interest of grantor in and to all lands in the State of Texas; said power of attorney recorded in Harris county Oct. 7th, 1852; in Erath county November 2, 1870; in Leon county February 17, 1860; in Limestone county January 10th, 1877; in Eastland county November 14th, 1878; in Hill county July 18th, 1888.

68 Original deed of E. M. Robinson, by his attorney, W. R. Baker, to J. De Cordova, a copy of which appears in Baker's testimony, pages 29–31, conveying, among other things, "J. H. Chisholm certificate for one-third of a league," said deed dated November 4, 1856, and recorded in Harris county January 4th, 1859; in Leon county February 17th, 1860; in Erath county November 2nd, 1870; in Limestone county January 9th, 1877; in Eastland county December 10th, 1878; in Hill county July 19th, 1888.

Deed from J. De Cordova, dated May 1st, 1857, to W. R. Baker, a copy of which appears in Baker's testimony, pages 34–36, conveying, among other things, the "J. H. Chisholm certificate for one-third of a league," dated May 10th, 1857, recorded in Harris county January 4th, 1859; in Leon county February 16th, 1860; in Eastland county November 17th, 1878; in Limestone county January 9th, 1877; in Hill county July 19th, 1888.

Deed from W. R. Baker to Geo. G. & J. L. White, conveying the land described in plaintiffs' petition, with general warranty, dated May 20, 1882, duly recorded in Hill county June 1st, 1882.

Deed from Geo. G. White to Jos. L. White, conveying said land, dated October 6th, 1883, recorded in Hill county October 6th, 1883. Defendant proved payment of purchase-money to Baker as follows: $1,230.00 on May 20th, 1882, and $2,460 at later date, $3,690.00 being the total consideration.

Defendants introduced depositions of R. M. Hall, commissioner of general land office of Texas, taken by defendants on April 23rd, 1890, as follows:

I attach page 422 of Application Book, which is an archive of my office. It shows that on January 2nd, 1858, the papers relating to the claim of J. H. Chism were lodged in this office; that the name of the original grantee of the claim or certificate was J. H. 69 Chism; that the papers were filed by J. M. Steiner; that the field-notes call for ⅓ of a league; that the certificate was a second class; that the land office district in which the papers were filed was "Robertson," and that the land office file number was 518. The entry in the patent delivery book, which is an archive of my office, show that on April the 2, 1858, the patent -as delivered to J. M. Steiner; that the original grantee was J. H. Chism; that the patent was No. 7, vol. 6; that it was for one-third league of land and was second-class certificate, and that $1 patent fees was paid.

Defendant introduced the depositions of R. M. Hall, commissioner of the general land office of Texas, taken by defendant on Nov. 20, 1890, as follows:

During the year 1841 an abstract from the board of land commissioners of the various counties of the Republic of Texas was prepared and printed by order of the commissioner of the general land office. In the preparation of the manuscript for the printer, in order to proper classify the certificates, which appeared on the original reports of the travelling board as genuine, the clerk in charge of the work made pencil memoranda of the class to which each certificate belonged. All certificates for one league and one labor issued to heads of families and one-third league issued to single men who resided in Texas March 2nd, 1836. "2nd class," used in the original, of which I attach a copy, means that the person to whom certificate No. 701 issued was a volunteer and single man, who arrived in Texas after March 2, 1836, and before August 1, 1836. and was honorably discharged. Said report of the travelling board, showing the certificates issued by the board of land commissioners of Harris or Harrisburg county, contain no reference to certificate No. 701 except what is shown by the certified copy on page 20 of said report, which I here attach with the certificate attached to said original report, which is as follows:

70 "*Statement Showing the Number of Certificates of First Class Issued in Harris County and Recommended as Genuine Claims.*

No. of certificate.	Name of applicant.	Date of certificate.	League.	⅓ league.	
699	H'rs of Jno. Flowers, dead	1838, Oct. 11...	....	⅓	2
760	Louis Landreth....	Nov. 1...	....	⅓	2nd cla.
701	J. H. Chisholm....	" 1...	....	⅓	" "
702	Prosper Mangle...	" 1...	....	⅓	" "

etc.

We, the undersigned, members of the investigating board of land commissioners appointed by Congress to investigate the records of the different boards of land commissioners east of the Brazos river, do hereby certify that we have investigated the above and foregoing claims and find the same to be genuine claims against the Government, and recommend them to the commissioner of the general land office as such, but not issued in conformity with law, as there is no evidence of the applicants having subscribed to the oath as prescribed by law. We also find that the numbers on the original records do not correspond with the numbers of the certificates, and in order to facilitate the investigation we have numbered the foregoing claims according to the applications, there being no numbers attached to the applications found on record or to a portion of the claims.

Given under our hands, in the city of Houston, Harris county, this 23rd day of June, 1841.

NATHAN HALBERT.
H. L. WILLIAMS.
ROB'T W. SMITH.
GEO. WM. ADAMS.
JNO. H. MOORE.
W. K. WILSON.

Test: F. R. LUBBOCK,
Clerk of the Investigating Board Land
Commissioners East of the Brazos."

71 There is no certificate in the name of J. H. Chisholm returned to this office; the name of the grantee in certificate No. 990 is J. H. Chism; the clerk's return from Harris or Harrisburg county shows no 2nd-class certificate issued from that land district to J. H. Chisholm; the clerk's return from Harris or Harrisburg land district or county shows that a 2nd-class land certificate was issued there to J. H. Chism and described as states in my former depositions.

Defendant proved that he and George G. White fenced the land in May, 1882, and that they held joint possession of the same until the date of his deed from said Geo. G. White, using, occupying, and enjoying the land, having the same enclosed with a fence, and that since the date of said deed he has continuously had said land so enclosed, holding same exclusively up to this date, and that he has paid taxes on said land, in conjunction with said Geo. G. White, until the date of said deed from said Geo. G. White unto him, and since said date he alone has paid taxes on said land, the taxes being paid each and every year since the date of said deed by Baker to him up to this date. He showed that he believed that he was getting title to said land at the time of his purchase, and that he bought the same in good faith, and so held it up to the institution of this suit, and so has always held it, and that while he so purchased and held it he erected valuable improvements on it, putting two tanks on it of the value of $125.00 and building wire fence on it which costs about $900.00; that the tanks and fence were built in 1882, were not so valuable as when built, and that fence wire costs about one-half now of what it did in 1882; that, exclusive of said improvements, the land is worth $10 per acre.

Plaintiffs introduced in evidence two certified copies from the office of the comptroller of Texas of two original military vouchers or certificates, being archives of said office, which were as 72 follows:

"CITY OF HOUSTON, *May 26th*, 1837.

This is to certify that John Rogan, a private in Capt. Owen's Company A, 1st reg't Prnt. Vol., has served in said company from the seventh of June, 1836, to the 26 May, 1837, for which he has received no pay from the government.

J. H. CHISM,
1*st Lieut.*, *Co. A*, 1*st Reg't P. V.*

Approved.
J. SNIVELY,
Act'g Sec. of War.

Endorsements: 1760. $93.06. John Rogan. Filed June 6th, 1837. Examined. Drawn for $93.06. Military. J. M. Moody, auditor. 7th June, 1837. No. draft, 2255 N. 11 mos. 19 days. $93.06."

"To whom it may concern:

Know ye that George Kelley, a private of Capt. Clark L. Owen's company, Pt. reg't Pemt. Vol., who was enlisted the twenty-six day of June, one thousand eight hundred and thirty-six, to serve during the war, is hereby honorably discharged from the army of Texas in consequence of inability.

Said Kelley was born in the State of New Jersey, is twenty-seven years of age, five feet seven inches high, dark complexion, dark eyes, dark hair, and by occupation, when enlisted, a shoemaker.

Given at Camp Preston this 8th day of March, one thousand eight hundred and thirty-seven.

J. H. CHISM,
1*st Lieut. Commanding.*

73 Approved.
JAS. H. D. ROGERS,
Col. 1*st Reg't Prnt. V.*, *T. A.*

Endorsements: 721. $67.40. George Kelley. Filed 15th March, 1837. Examined same day. Admitted to audit for $67.40. (8 months.) J. M. Moody, auditor. Military. (13 days.) 26th June, 1837. Is'd 15 March, 1837. No. draft, 975 F. Draft delivered.

Plaintiffs introduced in evidence the following certified copy of land certificat- No. 4298, the original of which is an archive of the general land office of Texas:

"No. 4298. REPUBLIC OF TEXAS. 1,280 acres.

Know all men to whom these presents shall come that J. H. Chism has served faithfully and honorably for the term of five months, from the sixteenth day of December, 1836, until the twenty-seventh day of May, 1837, and having resigned as lieutenant (& enter- for war) is entitled to twelve hundred and twenty acres bounty land, for which this is his certificate; and the said J. H. Chism is entitied to hold said land or to sell, alienate, convey, and donate the same and to exercise all rights of ownership over it.

In testimony whereof I have hereunto set my hand, at Houston, this fifteenth day of September, 1838.

GEORGE W. HOCKLEY,
Secretary of War.

WM. G. COOKE,
Sec'y War and Marine.

Approved Sept. 4, 1845."

74 GENERAL LAND OFFICE,
AUSTIN, TEXAS, *December 1st*, 1890.

I, R. M. Hall, commissioner of the general land office of the State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original now on file in this office.

In testimony whereof I hereunto set my hand and affix the impress of the seal of said office the day and date last above written.

R. M. HALL, [SEAL.]
Commissioner.

GENERAL LAND OFFICE,
AUSTIN, TEXAS, *December 4th*, 1890.

This is to certify that it appears from the records of this office that original bounty warrant No. 4298, in name of J. H. Chism, of which the instrument of writing above is a certified copy, was filed in the general land office October 6th, 1841, together with field-notes of a survey of 1,280 acres of land made by virtue thereof in Liberty Co.

In testimony whereof I hereto set my hand and affix the impress of the seal of said office the day and date last above written.

R. M. HALL, [SEAL.]
Commissioner.

Plaintiffs introduced in evidence a certified copy from the general land office of Texas of the muster-roll from October 31st to December 31st, 1836, of Capt. Clark L. Owen's Company A, 1st regiment of Permanent Volunteers, in the Texas army, commanded by Joseph H. D. Rogers, said original muster-roll being an archive of said office. This muster-roll contained the name of Jas. H. Chism as first lieutenant, and gave the date of his enrollment as June 12th, 1836.

75 Plaintiffs introduced in evidence the depositions of AUGUSTIN MOREMAN, taken by plaintiffs on Feb. 11, 1890, as follows:

I am 60 years old and reside in Orange county, Florida, and from 1850 to 1855 I lived in Meade county, Ky.; I knew the parties, man and woman, who claimed to be the parents of J. H. Chism, and they were so regarded and known; do not remember their given names; cannot say when *when* my acquaintance with them began, but was acquainted with them up to the death of old Mr. Chism, in 1851 or 1852, at Brandenburg, Meade county, Ky.; think they both died at Brandenburg. I knew only one child they left, but knew of others; the one I knew if now alive lives at Brandenburg, and her name is Mrs. Boling, wife of one Wm. Boling. I had both power of attorney and contract from the father of J. H. Chism to locate some land in Texas, such power of attorney and contract being made at Brandenburg, Meade county, Ky., in 1850 or 1851; cannot say which; said power of attorney and contract are not in my possession, nor can I say where they are; after the death of the father of J. H. Chism, the papers being of no further value, I lost sight of them, nor do I remember having seen them after his death, in 1851 or 1852; the power of attorney authorized me to go to Texas to locate lands for J. H. Chism's father and heir, due J. H. Chism as a soldier from the Republic of Texas, and gave me one-half the land so located; I was to be at all the expense, and have so far received nothing. The father of J. H. Chism turned over to me papers relating to land claims in Texas in 1850 or 1851, in April or May, for the purpose of locating land in Texas on his (J. H. Chism's) certificate of discharged soldier of the Republic of Texas. I only especially remember one paper; there were other papers, but I do not remember their purport. I think there was an army discharge among the papers, but cannot say from what army; it was given to J. H. Chism and was made out in his name, but I do not know what rank he held; the last I knew of these papers I delivered them to the mother
76 of J. H. Chism in the latter part of the year 1850 or 1851.

Attached to the interrogatories was the following certified copy of the certificate by virtue of which the land in controversy was located, the original being an archive of the general land office of Texas:

"No. 990. Class 2nd.

REPUBLIC OF TEXAS, *County of Harrisburg.*

This is to certify that J. H. Chism has appeared before us, the board of land commissioners for the county aforesaid, and proved according to law that he arrived in this Republic subsequent to the declaration of independence and previous to August, 1836, and that he is a single man and produced an honorable discharge, is entitled to one-third of a league of land, to be surveyed after the first day of August, 1838.

Given under our hands at Houston this 1st day of Nov., A. D. 1838.

J. G. HUTCHINSON, *President.*
JNO. WOODRUFF,
Associate Commissioner.

Attest: THOS. WM. WARD, *Clerk.*"

I have examined the above copy and should say that the original, of which it is a copy, was among the papers turned over to me by the father of J. H. Chism. (To the introduction of this evidence, namely, "that he should say" that the original of said instrument, purported to be a copy, was among the papers turned over to me by the father of J. H. Ch*sim*, defendant White objected because the statement of the witness was indefinite, was a mere opinion, and showed that he was merely guessing at the answer; which objection the court overruled and admitted said testimony; to which action of the court the said defendant then and there excepted and still excepts, and asks that the same be allowed as exception
77 No. 2 and enrolled as such in this bill of exceptions, which is accordingly done.) The language seems familiar and I recognize some of the terms, as "having an honorable discharge" and "being a single man." The original paper was folded twice and the folds were somewhat frayed with handling, looking like an*d* old paper; the writing was remarkably effeminate. I cannot say definitely whether the original paper was returned to the father or mother of J. H. Chism or not; the last time I ever saw it it was in Austin, Texas, in 1850 or 1851, in the month of May. As above stated, I was employed to locate lands in Texas for the father of J. H. Chism, and the papers were given me to enable me to carry out the contract. As the boat was rounding to take me aboard, on my way to Texas by way of New Orleans, Mr. Chism and I were walking down to the boat together and he said, "Do not lose the certificate," and said that the other papers were of no value without it. I went to Austin, Texas, for the purpose of carrying out the contract in 1850 or 1851; examined the records there in the general land office; found that Mr. Chism was entitled to ⅓ of a league—over fourteen hundred acres of land; found that my power of attorney was not properly acknowledged and so could not locate the lands. The defect in the power of attorney was that it was acknowledged before the clerk of the circuit court in and for Meade county, Ky., instead of before the Texas commissioner at Louisville, Mr. Pope. For this reason the land office refused to recognize the power of attorney. I then returned to Kentucky to have the paper corrected, leaving the papers given me by Mr. Chism in the hands of a Mr. Fergerson, then living in Austin—an old acquaintance of my father's. Before having the power of attorney acknowledged before the proper party Mr. Chism died of cholera in Brandenburg, and that ended the contract. Having left the papers with Mr. Ferguson, in Austin, after the death of Mr. Ch*sim* I wrote to Mr. Ferguson, to send them to me at
78 Brandenburg, which he did, and I turned the said papers over to Mrs. Chism, the mother of J. H. Chism. When

I received the papers at the post office I gave them to Mrs. Chism without examining them. The last time I examined them was in Austin, Texas, before and at the time of giving them to Mr. Ferguson. The officials at the land office pronounced the papers all in proper shape except the power of attorney. I made the trip in 1850 or 1851, by way of boat from Brandenburg to New Orleans, up Buffalo bayou by steamer "Farmer" to Houston, and from there to Austin by stage and wagon, making the entire trip in about 15 days. My father's name was Alanson Moreman, now dead. In 1850 he lived in Meade county, Ky. I have lived in Orange county, Florida, six years and came here from Shelby county, Mo. My post office is Lake Howell. I last saw the original of the copy of the certificate heretofore referred to in Austin, Texas, in the hands of Mr. Ferguson in 1850 or 1851, this being the last time I definitely remember having seen it. It may have been among the papers I handed Mrs. Chism, but, not having opened the papers, I cannot say. If the copy of the certificate attached to the interrogatories had not been furnished me I would not have been able to remember its date, the persons by whom it was issued, and the persons by whom it was attested. I never made but one trip from Brandenburg, Ky., to Texas, and that was in 1850 or 1851. I cannot remember the county-seats or counties I passed through; do not remember the names of the hotels or their proprietors with whom I stopped. I visited New Orleans, Galveston, Houston, and Austin, and on my way back went to Gonzales, Victoria, and Port Lavaca. I talked to no one except Mr. Fergerson and the officials at the land office about the land business of Chism. Mr. Fergerson was a gentleman of leisure, and had no place of residence. He came from Mt. Sterling, Montgomery county, Ky., and was a man of means. I
79 went to the capital of Texas at Austin in 1850 or 1851. The
governor of Texas was Mr. Bell. I do not remember who the commissioner of the general land office was. The first time I was written to in reference to my testimony in this case was by my father, who enclosed me a letter from Mr. Kirby, of Austin, requesting me to answer it, which I did. Mr. Kirby then wrote to me. These two letters were the first communications I had on the subject. Since then Mr. Kirby wrote me one more letter to see if I would be at home about this time. I had been away from home for some months. I do not remember the date of my contract with old Mr. Chism nor who was present when it was executed. It was acknowledged before Wm. Farleigh, clerk of the circuit court of Meade county, Ky.; do not remember whether or not there were any subscribing witnesses. The papers referring to the land claims in Texas were turned over to me alone by the father of J. H. Chism. I cannot give a copy of the papers or tell who executed or witnessed them or their dates or anything about them except as above stated. When I delivered the papers to Mr. Fergerson in Austin, Texas, as I remember, no one was present nor was any one present when I returned them to Mrs. Chism.

And be it remembered that on the trial of this cause, on the 6th day of May, 1891, the defendant, J. L. White, requested the court to charge the jury as follows, being charge No. 1: "The uncontroverted evidence in this cause shows that the certificate by virtue of which the land in controversy was located came into the hands of W. R. Baker, as agent of E. M. Robinson, as a purchaser in December, 1838, and that it was thereafter located on the land by Steiner, as the agent of Baker, who had acquired the title of Robinson in the same, and if the person who sold the same to Robinson through Baker, under whatever name, was at the time of the sale to Baker the owner of the certificate, you will find a verdict for the
80 defendant, and in this connection you are instructed that it is a presumption of fact that a person in possession of a certificate is the owner in the absence of evidence to the contrary, whether he had a written assignment or not, and it is shown by the evidence that the certificate in question was in possession of the person who sold it to him for Robinson recently after it was issued, it having been issued in November, 1838. If you should believe that such person was not the same to whom it was issued, yet unless the evidence shows that the person to whom it was issued had not sold it, you would be authorized to find for the defendant;" which charge was refused by the court, the court having in its general charge (given without request) instructed the jury that on the undisputed proof the jury would find for plaintiffs unless the grantee in the certificate 990 sold the same in his lifetime or as to Mrs. Van Horn's one-third interest the plaintiffs were defeated by defendant's plea of the five years' statute of limitation; to which action of the court refusing said charge the defendant, J. L. White, before the jury retired, in open court excepted and still excepts because the uncontroverted evidence was as stated and because the issue, whether the grantee of the certificate may have assigned it to the person from whom Baker testified he received it, was raised by the evidence and no charge was given by the court upon the point as to the effect of the possession of the certificate or that the same could pass by parol, and said defendant prays that his exception be certified as a part of the record, which is here now accordingly done in term. This is exception No. 3.

Exception No. 4.

And be it further remembered that on the trial of this cause the defendant, J. L. White, requested the court to instruct the jury as follows, being charge No. 2: "The certificate was issued to a
81 person whose name was spelled therein Chism. The transfer in evidence shows that the person who transferred the same spelled his name Chisholm. Now, if the person who transferred the certificate was the same to whom it was issued, it is not material in what form he signed it, you will find for the defendant, and in determining whether he was the same person you may consider the fact, if a fact, that the person who sold to Baker was a soldier, the date of his certificate, the date of the transfer, the whereabouts of J. H. Chism about the time, and the evidence introduced by plain-

tiffs for the purpose of showing where the certificate was, and it is in evidence by plaintiffs that J. H. Chism was in Texas about the time of the transfer;" which said charge was refused by the court; to which ruling of the court the said defendant then and there, before the retirement of the jury, excepted and still excepts because the issue thus presented was raised by the evidence and the court had on this point only charged the jury as follows: "The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed J. H. Chisholm, and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiffs' recovery of two-thirds of the land sued for, and on this issue as to the person who made said transfer being the same person to whom said certificate No. 990 issued the burden of proof is on the defendant, and if the proof does not so satisfy you the plaintiffs are entitled to recover the whole land unless defeated by the defendant's plea of five years' limitation as to Mrs. Van Horn's one-third interest therein;" which exception said defendant prays to be certified as a part of the record, which is here now accordingly done in term. 82

Exception No. 5.

And be it further remembered that upon the trial of this cause on said May 6th, 1891, the defendant requested the court to instruct the jury as follows, being charge No. 3: "It is shown by the evidence that the certificate has been in the land office since 1857 and is now there, and if the certificate or paper about which plaintiffs testified was burned in Dallas or elsewhere, then the paper testified about by them is not this certificate;" which said charge so requested was refused by the court; to which action of the court the defendant then and there and before the retirement of the jury excepted and still excepts because it was so shown by the evidence and the testimony introduced by plaintiffs that the papers which it was claimed by the plaintiffs were with the certificate were burned in Dallas in the year 1874, long after the filing and location of the certificate and the patenting of the land. Defendant prays that this his exception be certified as a part of the record, which is here now accordingly done in term.

Exception No. 6.

And be it further remembered that on the trial of this cause on the day aforesaid the defendant, J. L. White, asked the court to instruct the jury as follows, being charge No. 4: "The transfer introduced by defendant to the certificate is not a forgery in law, whether signed by the person who was the owner of said certificate acquired from the person to whom issued or by the person to whom it was issued, and you are instructed that, if in this case you should find for the plaintiffs, in any event you will find for the defendant one-third of the land as against M. A. Van Horn, and for the other plaintiffs for only two-thirds of the land;" which said charge 83 was refused; to which ruling defendant then and there excepted before the jury retired and still excepts on the ground that taking the whole evidence, as substantially stated herein, the issue of forgery was not raised by the evidence and the uncontroverted facts show, as charged by the court, that the defendant was entitled to one-third of the land by limitation, unless the transfer of the certificate was a forgery and the court did submit to the jury the issue as to whether said transfer was forged, and defendant prays that this his said exceptions be certified as a part of the record, which is here now accordingly done in term.

Exception No. 7.

And be it further remembered that on the trial of this cause on the aforenamed date, the court at the request of the plaintiff, gave the following charge to the jury, being special charge No. 1: "If you believe from the evidence that W. R. Baker falsely made or caused or procured to be falsely made or in any way aided, assisted, advised, or encouraged the false making of the transfer to E. M. Robinson, signed J. H. Chisholm, and purporting to convey the land certificate 990, issued to J. H. Chism, with intent to make valuable thing or money thereby or with intent to set up a claim or title or to aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interests of the true owner of the land, then the said transfer is a forgery and you will find for plaintiffs for the land in controversy;" to the giving of which said charge the defendant White then and there excepted before the retirement of the jury and still excepts because said charge submitted issues not raised by the evidence and was calculated, by submitting to the jury whether there was such proof as to the action of Baker, to prejudice the cause of defendant, in support of which Baker's 84 testimony was material and necessary, and because said charge assumes that said transfer was false; which exceptions defendant prays be certified and made a part of the record, which is here now accordingly done in term.

Exception No. 8.

And be it further remembered that the court, at the request of the plaintiffs, charged the jury as follows: Special charge No. 2: "If you believe from the evidence that a man of the name of J. H. Chisholm, or of any other name, who was not the identical party to whom the certificate No. 990, issued to J. H. Ch*si*m, issued, did falsely make the transfer to E. M. Robinson, signed 'J. H. Chisholm,' with the intent to make money or other valuable thing thereby or with intent to set up a claim or title or aid or assist an*d* one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owners of this land, or with any fraudulent intent whatever, then said instrument you will find to be a forgery, and you will bring a verdict for the plaintiffs for the land in controversy."

Special charge No. 3: "If you believe from the evidence that J. H. Chisholm, or any other person not being the identical person to whom certificate 990 in the name of J. H. Chism issued, did falsely counterfeit the original grantee in making the transfer to E. M. Robinson, signed 'J. H. Chisholm,' with the intent to make money or other valuable thing thereby or with the intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy, or to cast a cloud upon the title, or in any way injure, obtain the advantage of, or prejudice the rights of the true owner of the land, or with any fraudulent intent whatever, then you will find said instrument a forgery, and will find for plaintiffs for the land in controversy;" to the giving of which charges defendant, J. L. White, before the retirement of the
85 jury then and there excepted and still excepts upon the following grounds: Because said special charge No. 2 excluded the hypothesis that some person to whom the grantee of the certificate may have transferred it by delivery was the person who signed the transfer, because the evidence shows that there was no land located by virtue of the certificate at the time the assignment was made or purported to be made, and because said charge submitted issues not raised by the evidence, all of the evidence upon that subject being set out hereinbefore, and because said special charge No. 3 excludes the hypothesis that the assignee of the certificate by the grantee may have been the person who transferred it, and because the issue therein submitted was not raised by the evidence, and because the counterfeiting of the original grantee would not constitute forgery within the meaning of the statute of forgery, which precludes a party, the other necessary facts concurring, from setting up the statute of limitations of five years; which said exceptions defendant prays be signed and certified as a part of the record, which is here now accordingly done in term.

Exception No. 9.

And be it further remembered that the court, at the request of plaintiffs, gave the following special charge, to wit: "The certificate in this case issued to J. H. Chism. Defendant claims through transfer to E. M. Robinson, signed 'J. H. Chisholm.' The burden of proof is upon the defendant to show that the man who signed this transfer was the identical man to whom the certificate issued. If he has failed to show this identity you will find for the plaintiffs for two-thirds of the land, unless you believe from the evidence and under the charge of the court that the transfer above alluded to is a forgery, in which event you will find for the plaintiffs for all the land in controversy;" to the giving of which charge the
86 defendant White then and there excepted before the retirement of the jury and still excepts because said charge excludes the hypot-esis that some person to whom the grantee of the certificate may have transferred it may have signed the transfer,

and because said charge submitted the issue of forgery; and, further, because that part of said charge which instructed the jury that it must be shown that the identical man to whom the certificate issued signed the transfer had been given by the court in its general charge and in charge No. 2 requested by the plaintiffs, thus by repetition emphasizing the question as to whether the person who signed the transfer was the original grantee of the certificate. Defendant prays that t-is his exception be certified and made a part of the record, which is here now accordingly done in term.

Exception No. 10.

And be it further remembered that on the trial of this cause, on the day aforesaid, the court charged the jury as follows: "The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed 'J. H. Chisholm,' and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiffs' recovery of two-thirds of the land sued for, and on this issue as to the person who made said transfer being the same person to whom the said certificate No. 990 issued the burden of proof is on the defendant, and if the proof does not so satisfy you the plaintiffs are entitled to recover the whole land, unless defeated by the defendant's plea for the five-year statute of limitation as to Mrs. Van Horn's one-third interest therein;" to the giving of
87 which charge the defendant White then and there, before the retirement of the jury, excepted and still excepts because said charge in effect requires more than a preponderance of the evidence on the part of the defendant to prove that the person who signed the transfer to the certificate was the same person to whom the certificate was granted, and because said charge excluded the hypothesis that the certificate might have been transferred by some person who acquired it from the original grantee by delivery or parol assignment. The defendant prays that this exception be signed and certified as a part of the record, which is here now accordingly done in term.

Exception 11.

And be it further remembered that on the trial of this cause the court instructed the jury that if they found for the plaintiffs the whole of the land in controversy they would find for the defendant White against the executors of Baker the sum of $3,690.00, with 8 % per annum interest from the 2nd day of October, 1887, to the date of the trial (it being in evidence that that was the amount of the purchase-money paid by White to Baker), and this suit having been filed on the 2nd day of October, 1889, and the court also instructed the jury to find for the defendant White the value of his improvement made in good faith, and that if the amount exceeded the value of the use and occupation of the premises from the 2nd of

October, 1887, they would find the value of the use and occupation from the time said White took possession, not to exceed the value of the improvements, and deduct it from the value of the improvements (and it appeared from the evidence that White did take possession in May, 1882); to which instruction of the court limiting the right of defendant to recover interest before the date of Oct. 2nd, 1887, defendant, J. L. White, excepted and still excepts
88 because it is in the law that White was entitled to recover of his warrantor Baker interest for all the time that he was charged with use and occupation, notwithstanding the fact that the recovery for use and occupation was offset by the improvements made; which said exception defendant prays be signed and certified as a part of the record, which is accordingly done in term.

And the defendant, Joseph L. White, by his counsel, having made the several exceptions hereinbefore set forth, numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, to the rulings of the court and still adhering thereto, asks that this bill of exceptions may be signed, which is accordingly done, that the same may become part of the record as such this 19th day of June, 1891, the same signed after term by consent of all parties, plaintiffs and defendant.

A. P. McCORMICK,
U. S. Dist. Judge.

Endorsed: No. 399. M. A. Van Horn *et al. vs.* Joseph L. White. Bill of exceptions. Filed June 29th, 1891 J. H. Finks, clerk, by C. A. Richardson, deputy.

Assignment of Errors by Defendant.

JOSEPH L. WHITE, Plaintiff in Error,
vs.
M. A. VAN HORN *et als.*, Defendants in Error.
} Assignment of Errors.

Now comes the plaintiff in error in the above-styled cause and assigns the following errors committed by the honorable United States circuit court for the northern district of Texas, at Waco, in the trial of this cause, wherein M. A. Van Horn *et al.* were plaintiffs and Joseph L. White *et al.* defendants:

1st. The court erred in permitting the plaintiffs below to introduce in evidence, over the objection of defendants below, the following certified copy of a transfer of bounty warrant:

89 REPUBLIC OF TEXAS,
County of Harrisburg. }

Be it known that this day before me, John Alexander Newlands, a notary public for the county aforesaid, duly commissioned and qualified, personally appeared the citizen, J. H. Chism, who declared that for and in consideration of the sum of five hundred dollars to him in hand paid by R. B. Dobbins, the receipt of which is hereby acknowledged, he has this day granted, bargained, sold, alienated, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, convey, and confirm, unto the said R. B. Dobbins, his heirs and assigns, a certificate containing twelve hundred and eighty acres of bounty land, granted to him by the Secretary of War on the fifteenth day of September, one thousand eight hundred and thirty-eight, for services rendered the Government from the 16th day of December, 1836, until the 27th day of May, 1837, as appears by said certificate No. 4298, hereon annexed; to have and to hold said certificate of bounty land to him, the said R. B. Dobbins, his heirs and assigns forever; and he, the said J. H Chism, for himself, his heirs and assigns, the said bargained certificate, with all the rights thereunto belonging, to the said J. H. Chism, his heirs and assigns, shall and will warrant — forever defend against the claims of all persons whatsoever.

In testimony whereof he hath hereunto fixed his name and seal, in presence of J. G. Hutchison and James L. Eubanks, witnesses of lawful age, and me, the said notary, at the city of Houston, this thirty-first day of October, 1838.

J. H. CHISM. [SEAL.]

Witnesses:
J. G. HUTCHISON.
JAMES L. EUBANKS.

To the introduction of the aforesaid transfer in evidence the defendant objected because the facts that J. H. Chisholm signed
90 his name on one occasion "J. H. Chism" did not show nor tend to show that he *was* not on another occasion sign his name "J. H. Chisholm," the names being *idem sonans*, and said evidence did not tend to *il*lucidate any issue in this case and was hence immaterial and irrelevant.

2nd. The court erred in permitting the plaintiffs below to read in evidence the deposition of Alanson Moreman, wherein said witness said that he "should say the copy of certificate No. 990, issued to J. H. Chism, which was attached to the interrogatories propounded to him by plaintiffs below, was a copy of the original certificate put in his hands by the father of J. H. Chism. Defendant below objected to the statement that he "should say it was the same" being admitted as testimony, as is shown in bill of exceptions No. 2.

3rd. The court erred in refusing to give to the jury the special charge No. one asked by Joseph L. White, said special charge as follows:

Charge No. 1. "The uncontroverted evidence in this cause shows that the certificate by virtue of which the land in controversy was located came into the hands of W. R. Baker, as agent of E. M. Robinson, as a purchaser in December, 1838, and that it was thereafter located on the land by Steiner as the agent of Baker, who had acquired the title of Robinson in the same, and if the person who sold the same to Robinson through Baker, under whatever name, was at the time of the sale to Baker the owner of the certificate, you will find a verdict for defendant; and in this connection you are instructed that it is a presumption of fact that a person in possession of a certificate is the owner in the absence of evidence to the contrary, whether he have a written assignment or not, and it is shown by the evidence that the certificate in question was in possession of a person 91 who sold it to him for Robinson recently after it was issued, it having been issued in November, 1838; if you should believe that such person was not the same to whom it was issued, yet, unless the evidence shows that the person to whom it issued had not sold it, you would be authorized to find for the defendant."

The court having in its general charge (given without request) instructed the jury that on the undisputed proof the jury would find for the plaintiffs unless the grantee in the certificate 990 sold the same in his lifetime, unless, as to Mrs. Van Horn's one-third interest, the plaintiffs were defeated by defendant's plea of the five years' statute of limitations.

4th. The court erred in refusing to give to the jury the 2nd special charge asked by the plaintiff in error, Joseph L. White, said charge as follows, being charge No. 2: "The certificate was issued to a person whose name was spelled therein Chism. The transfer in evidence shows that the person who transferred the same spelled his name Chisholm. Now, if the person who so transferred the certificate was the same to whom it issued, it is not material in what form he signed it, you will find for the defendant; and in determining whether he was the same person *who* may consider the fact, if a fact, that the person who sold to Baker was a soldier, the date of his certificate, the whereabouts of J. H. Chism about the time, and the evidence introduced by plaintiffs for the purpose of showing where the certificate was, and it is in evidence by plaintiff that J. H. Chism was in Texas about the time of the transfer;" which charge was offered in connection with the only charge given by the court on this point, as follows:

"The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed J. H. Chisholm, and in order for this transfer to convey title to said certificate the proof must satisfy you that 92 the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiff's recovery of two-thirds of the land sued for; and on this issue as to the person who made the transfer being the same person to whom said certificate No. 990 issued the burden of proof is on the defendant;" "and if the proof does not so satisfy you the plaintiffs are entitled to recover the whole land unless defeated by the defendants' plea of the five-year limitations as to Mrs. Van Horn'- one-third interest."

5th. The court erred in refusing to give to the jury special charge No. 3 asked by Joseph L. White, said special charge as follows:

"It is shown by the evidence that the certificate has been in the land office since 1857 and is now there, and if the certificate or paper about which plaintiffs testify was burned in Dallas or elsewhere, then the paper testified about by them is not this certificate."

6th. The court erred in refusing to give to the jury the 4th special charge asked by Joseph L. White, said charge as follows:

"The transfer introduced by defendant to the certificate is not a forgery in law whether signed by the person who was the owner of said certificate acquired from the person to whom it issued or by the person to whom it issued, and you are instructed that if in this case you should find for the plaintiffs, in any event you will find for the defendant one-third of the land as against M. A. Van Horn and for the other plaintiffs only two-thirds of the land."

7th. The court erred in giving to the jury the special charge No. 1 requested by the plaintiffs below, said charge as follows:

"If you believe from the evidence that W. R. Baker falsely made
or caused or procured to be made falsely or in any way aided, as-
sisted, advised, or encouraged the false making of the trans-
93 fer to E. M. Robinson, signed J. H. Chisholm, and purport-
ing to convey the land certificate 990, issued to J. H. Chism,
with intent to make valuable thing or money thereby or with in-
tent to set up a claim or title or to aid or assist any one else in
setting up a claim or title to the land in controversy or in any way
to injure, obtain the advantage of, or prejudice the rights or interest
of the true owner of the land, then the said transfer is a forgery,
and you will find for plaintiffs for the land in controversy."

8th. The court erred in giving to the jury the 2nd and 3rd special charges asked by the plaintiffs below, said charges as follows:

Special charge No. 2. "If you believe from the evidence that a man of the name of J. H. Chisholm or of any other name who was not the identical party to whom the certificate No. 990, issued to J. H. Chism, issued did falsely make the transfer to E. M. Robinson, signed J. H. Chisholm, with the intent to make money or other valuable thing thereby or with intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owners of the land or with any fraudulent intent whatever, then said instrument you will find to be a forgery, and you will bring a verdict for plaintiffs for the land in controversy."

Special charge No. 3. If you believe from the evidence that J. H.
Chisholm or any other person not being the identical person to
whom certificate 990, in the name of J. H. Chism, issued did falsely
counterfeit the original grantee in making the transfer to E. M.
Robinson, signed J. H. Chisholm, with the intent to make money
or other valuable thing thereby or with the intent to set up a claim
or title or aid or assist any one else in setting up a claim or title
to the land in controversy or to cast a cloud upon the title
94 or in any way injure, obtain the advantage of, or prejudice
the rights of the true owner of the land or with any fraudu-
lent intent whatever, then you will find said instrument a forgery
and will find for plaintiffs for the land in controversy."

9th. The court erred in giving to the jury the following special charge given at the request of plaintiffs below, to wit:

"The certificate in this case issued to J. H. Chism. Defendant claims through a transfer to E. M. Robinson, signed 'J. H. Chisholm.' The burden of proof is upon the defendant to show that the man who signed this transfer was the identical man to whom the certificate issued. If he has failed to show this identity you will find for plaintiffs for two-thirds of the land unless you believe from the evidence and under the charge of the court that the transfer above alluded to is a forgery, in which event you will find for the plaintiffs for all the land in controversy."

10th. The court erred in giving to the jury the following charge, to wit:

"The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed 'J. H. Chisholm,' and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiffs' recovery of two-thirds of the lands sued for; and on this issue, as to the person who made the said transfer being the same person to whom said certificate No. 990 issued, the burden of proof is on the defendant; and if the proof does not so satisfy you the plaintiffs are entitled to recover the whole land unless defeated by the defendant's plea of the five years' statutes of limitation as to Mrs. Van Horn's one-third interest therein."

95 11th. The court erred in the following part of its general charge given to the jury, to wit:

The court instructed the jury that if they found for the plaintiffs the whole of the land in controversy they would find for the defendant White against the executors of Baker the sum of $3,960.00, with 8% per annum interest from the 2nd day of October, 1887, to the date of the trial (it being in evidence that that was the amount of the purchase-money paid by White to Baker, and this suit having been filed on the 2nd day of October, 1889); and the court also instructed the jury to find for the defendant White the value of his improvements made in good faith, and that if the amount exceeded the value of use and occupation of the premises from the 2nd day of October, 1887, they would find the value of the use and occupation from the time said White took possession not to exceed the value of the improvements and deduct it from the value of the improvements. Wherefore the plaintiff in error prays that the errors committed by the said circuit court be reviewed by the Supreme Court of the United States, and that this cause be reversed and remanded to the said circuit court of the United States for the northern district of Texas, at Waco, for another trial.

And will ever pray as in duty bound.

TARLTON & MORROW,
Att'ys for Plaintiff in Error, Joseph L. White.

Endorsed: No. 399. M. A. Van Horn *et al.* *vs.* J. L. White. Assignment of errors by defendant. Filed June 29, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

Petition in Error.

JOSEPH L. WHITE, Plaintiff in Error,
vs.
MARTHA ANN VAN HORN *et als.*, Defendants in Error.

96 To the Hon. Supreme Court of the United States:

Your petitioner, Joseph L. White, who resides in Hill county, Texas, and who is hereinafter styled plaintiff in error, complains of Martha Ann Van Horn, widow; Mary Ann Boling, joined by her husband, W. W. Boling; Elizabeth Evans and her husband, David B. Evans, and of Geo. G. White, and of P. K. Ewing, E. P. Hill, and Henry Brashear, the last three being the executors of the will of W. R. Baker, dec'd; shows that in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, between the said Martha Ann Van Horn, widow; Mary Ann Boling, joined by her husband, W. W. Boling; Elizabeth Evans, joined by her husband, David B. Evans, plaintiffs, against Joseph L. White and Geo. G. White and P. K. Ewing, E. P. Hill, and Henry Brashear, the last three named being sued as executors of the will of W. R. Baker, dec'd, and said defendants except Joseph L. White being sued as warrantors of the said Joseph L. White, and so by him made parties defendant, manifest error hath happened, to the great damage of the said Joseph L. White.

Wherefore plaintiff in error prays that your honorable court grant him a writ of error as provided by law, to the end that said error may be corrected, and that full and speedy justice may be done to the parties aforesaid.

TARLTON & MORROW,
Att'ys for Joseph L. White, Plaintiff in Error.

Allowed by—
A. P. McCORMICK,
U. S. Dist. Judge.

Endorsed: Joseph L. White, plaintiff in error, *vs.* Martha Ann Van Horn *et als.* Petition in error. Filed June 29, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Martha Ann Van Horn, widow; Mary Ann Boling, joined by her husband, W. W. Boling; Elizabeth Evans, joined by her husband, David B. Evans, plaintiffs, against Joseph L. White and Geo. G. White and P. K. Ewing, E. P. Hill, and Henry Brashear, the three last named being sued as independent executors of the will of W. R. Baker, dec'd, the said defendants except Joseph L. White being sued as warrantors of the said Joseph L. White, and so by him made parties defendant in said cause, a manifest error hath happened, to the great damage of the said Joseph L. White, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington not exceeding thirty days from this date, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 29th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.]

J. H. FINKS,
Clerk of the Circuit Court of the United States,
By CHAS. H. LEDNUM, *Deputy.*

Allowed by—
A. P. McCORMICK,
U. S. Dist. Judge.

[Endorsed:] No. 399. M. A. Van Horn *et al.* *vs.* Joseph L. White. Writ of error. Filed June 30th, 1891. J. H. Finks, clerk, by C. A. Richardson, deputy.

98 *Writ of Error Bond.*

Know all men by these presents that we, Joseph L. White, as principal, and N. Stroud and Nelson Maxfield, as sureties, are held and firmly bound unto Martha Ann Van Horn, Mary Ann Boling, W. W. Boling, Elizabeth Evans and David B. Evans, George G. White and P. K. Ewing, E. P. Hill, and Henry Brashear, executors of the will of W. R. Baker, in the full and just sum of two thousand and five hundred dollars, to be paid to said Martha Ann Van Horn, Mary Ann Boling, W. W. Boling, Elizabeth Evans and David B. Evans, Geo. G. White and P. K. Ewing, E. P. Hill, and Henry Brashear, executors as aforesaid, their certain attorneys, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a regular term of the circuit court of the United

States for the northern district of Texas, at Waco, in a suit depending in said court between Martha Ann Van Horn, widow; Mary Ann Boling, joined by her husband, W. W. Boling; Elizabeth Evans, joined by her husband, David B. Evans, plaintiffs, against Joseph L. White and Geo. G. White and P. K. Ewing, E. P. Hill, & Henry Brashear, the last three named being sued as independent executors of the will of W. R. Baker, dec'd, said defendants except Joseph L. White being sued as warrantors of the said Joseph L. White, and so by him made parties defendant in said suit, a judgment was rendered against the said Joseph L. White and in favor of the aforesaid plaintiffs in said court on the 6th day of May, 1891, said suit being designated on the record of said court No. 399, and the said Joseph L. White having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and citation directed to the said Martha Ann
99 Van Horn, Mary Ann Boling, W. W. Boling, Elizabeth
Evans, and David B. Evans, Geo. G. White and P. K. Ewing, E. P. Hill, and Henry Brashear, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, at the expiration of thirty full days from the day of service of said citation:

Now, the condition of the above obligation is such that if the said Joseph L. White shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

J. L. WHITE. [SEAL.]
N. MAXFIELD. [SEAL.]
N. STROUD. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved as a supersedeas bond by—
A. P. McCORMICK,
U. S. Dist. Judge.

Endorsed: No. 399. M. A. Van Horn *et al. vs.* J. L. White. Writ of error bond. Filed June 29, 1891. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

100 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Martha Van Horn, widow; Mary Ann Boling and her husband, W. W. Boling; Elizabeth Evans and her husband, David B. Evans; Geo. G. White and P. K. Ewing, E. P. Hill, and Henry Brashear, the three last named being the executors of the will of W. R. Baker, dec'd, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, at the expiration of thirty full days after service hereof upon you, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, wherein Joseph L. White is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 29th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.]

A. P. McCORMICK,
U. S. Dist. Judge.

Test with seal of said circuit court at Waco, Tex., this 30th day of June, 1891.

J. H. FINKS, *Clerk,*
By C. A. RICHARDSON, *Deputy.*

101 [Endorsed:] No. 399. M. A. Van Horn *et al. vs.* Joseph L. White. Citation. Filed June 30th, 1891. J. H. Finks, clerk, by C. A. Richardson, deputy.

On this 2nd day of July, in the year of our Lord one thousand eight hundred and ninety-one, personally appeared T. M. Wright before me, the subscriber, and makes oath that he delivered a true copy of the within citation to L. W. Campbell, Esq., of the firm of Alexander & Campbell, att'ys of record for P. K. Ewing, E. P. Hill, & Henry Brashear.

T. M. WRIGHT.

Sworn to and subscribed this 2nd day of July, A. D. 1891.

J. H. FINKS,
Cl'k U. S. Cir. Ct.
By C. A. RICHARDSON, *Deputy.*

We, T. W. Gregory and McKinnon & Carlton, attorneys of record for the following-named persons, to wit, Martha Ann Van Horn, widow; Mary Ann Boling and her husband, W. W. Boling; Elizabeth Evans and her husband, David B. Evans, hereby accept service of the within citation for said persons and for each of them and waive service of said citation and delivery of copy of same upon said persons or upon us, their attorneys of record.

Witness our hands this 30th day of June, 1891.

T. W. GREGORY AND
McKINNON & CARLTON,
Att'ys for All of Above-named Parties.

102 J. L. WHITE, Plaintiff in Error,
vs.
MARTHA ANN VAN HORN *et al.*, Defendants in Error.

I, Geo. G. White, defendant in error in the above-styled cause, accept service of the citation in error herein issued and agree that the cause shall be docketed in the United States Supreme Court and stand in all respects as if I had been duly served with citation.

Witness my hand. G. G. WHITE.

[Endorsed:] M. A. Van Horn *et al.* *vs.* J. L. White. G. G. White's acceptance of service of citation in error. Filed June 30th, 1891. J. H. Finks, clerk, by C. A. Richardson, deputy.

103 UNITED STATES OF AMERICA,
Northern District of Texas.

I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that the foregoing and attached 102 pages, numbered at the foot of each page from 1 to 102, inclusive, contain a full, true, and correct copy and transcript of the record and proceedings had and filed in said court, at Waco, in cause No. 399 on the docket of said court, entitled M. A. Van Horn *et al. vs.* Joseph L. White, as fully as the same appears on record and on file in my said office.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.

In testimony whereof I hereunto set my hand and affix the seal of the said circuit court of the United States, at office, in the city of Waco, Texas, on this the 17th day of July, A. D. 1891.

J. H. FINKS, *Clerk*,
By C. A. RICHARDSON, *Deputy*.

Endorsed on cover: Case No. 14,796. N. Texas C. C. U. S. No. 261. Joseph L. White, plaintiff in error, *vs.* Martha Ann Van Horn, Mary Ann Bowling and her husband, W. W. Boling, *et al.* Filed August 12, 1891.

Office Supreme Court, U. S.
FILED
DEC 13 1894
JAMES H. McKENNEY,
CLERK.

Office
DEC 13 1894

No. 261.

CAUSE PENDING IN

THE SUPREME COURT OF THE UNITED STATES.

JOSEPH L. WHITE, Plaintiff in Error.

vs.

MARTHA ANN VAN HORN, MARY ANN BOLING and her husband, W. W. BOLING, et al, Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Brief for Joseph L. White, Plaintiff in Error.

E. H. GRAHAM,
Attorney for Joseph L. White, Plaintiff in Error.
TARLTON & MORROW,
Of Counsel for plaintiff in Error, J. L. White.

No. 261.

CAUSE PENDING IN

THE SUPREME COURT OF THE UNITED STATES.

JOSEPH L. WHITE, Plaintiff in Error.

vs.

MARTHA ANN VAN HORN, MARY ANN BOLING and her husband, W. W. BOLING, et al, Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Brief for Joseph L. White, Plaintiff in Error.

STATEMENT OF NATURE AND RESULT OF SUIT.

This is an action of ejectment, or trespass to try title, brought on October 2, 1889, by Martha Ann Van Horn, widow, Mary Ann Boling, joined by her husband, Wm. W. Boling, Elizabeth Evans, joined by her husband, David B. Evans, alleged to be residents of the states of Missouri and Kentucky, as plaintiffs against Joseph L. White, as defendant. The suit, filed in the Circuit Court of the United States for the Northern District of Texas, at Waco, was for the recovery of one-third of a league of land, lying in Hill County, Texas, patented by the State of Texas to J. H. Chism, on March 17, 1858, and of the alleged value of $15,000. (See plaintiffs' petition, Rec. 1-2)

The defendant, Joseph L. White, answered, pleading the "general denial," "not guilty," the statutes of three and five years' limitations, as prescribed by the Revised Civil Statutes of Texas, and the suggestion that he was a purchaser in good faith, stating the improvements erected by him, and the grounds of his good faith, as similarly prescribed. He further answered, alleging that on May 20, 1882, W. R. Baker, a resident of Harris County, Texas, executed to him, and to Geo. G. White, a deed with covenant of general warranty, conveying to them the land in controversy, in consideration of which they paid to him on May 20, 1882, the sum of $1230, and on August 31, 1882, the further sum of $2570; that on October 6, 1883, Geo. G. White, by warranty deed, conveyed to defendant his undivided one half interest, in consideration of certain tracts of land of the value of $3789, so paid on October 6, 1883, by defendant to Geo G. White. By virtue of the covenants of warranty referred to, the defendant Joseph L. White prayed that W. R. Baker, a resident of Harris County, Texas, and Geo. G. White, a resident of Hill County, Texas, should be made parties to the suit; that, in the event that he should be condemned to be evicted, he recover from Baker the sum of $1230 with eight per cent interest from May 20, 1882, and the further sum of $2570, with eight per cent interest from August 31, 1882, and for judgment, in a similar event, against Geo G. White for the sum of $3789, with interest at eight per cent from October 6, 1883; and in the event of a partial recovery by plaintiffs of the land, he prayed for a proportionate recovery of the sums of money stated, the amount, if any, received in satisfaction of the judgment against Baker to go towards satisfying the judgment against Geo. G. White. (See amended answer, Rec. 3 et seq.)

To the plea making him a party, W. R. Baker interposed a plea alleging that the court had no jurisdiction over his person, because he was a resident of Harris County, in the Eastern District of Texas, and not of the Northern District. (See Rec. 7.)

Subsequently, W. R. Baker having died, E. P. Hill, P. K. Ewing, and Henry Brashear, as independent executors of W. R. Baker, deceased, were made parties defendant, at the instance of Joseph L. White, and against them as such executors the same relief was prayed as against Baker in the first instance (See amended answer, Rec. 3 et seq.; Baker's plea, 7; Brashear's appearance, 11.)

The executors named filed a plea to the jurisdiction similar in tenor and purport to that previously filed by W. R. Baker in his lifetime, and further answered with a general demurrer to the complaint of Joseph L White against them, and specially excepting, on the grounds: (1) that it is not competent for a court of law to entertain the contingent demand asserted against them; (2) that in this action of ejectment, or trespass to try title, which is sui generis, it is not competent to determine the issue of indebtedness asserted; (3) that it does not appear from the complaint of White that he had been ejected, actually or constructively, or that the plaintiffs have the paramount title. The executors further pleaded the general denial to the complaint of White, and specially that he should not recover interest as prayed for, because the vendees of Baker, since the date of the conveyance from him, had been in the possession, control and use of the premises. (See Rec. 10-11.)

The defendant Geo. G. White answered, admitting the facts alleged in the plea of Joseph L. White against him, and agreeing that the court should enter such judgment against him as the averments of the plea would justify. (Rec. 11.)

The plaintiffs filed their supplemental petition, or replication, alleging in avoidance of the statute of limitations plead by the defendant White that the plaintiffs M. A. Van Horn, Elizabeth Evans, and Mary Ann Boling claimed title to the land in controversy as the sisters and sole surviving heirs at law of J. H. Chism; that Elizabeth Evans, as the wife of David B. Evans, and Mary Ann Boling, as the wife of Wm. W. Boling, were, at the date of the taking possession of the land by Joseph L. White and those under whom he claims, married women, and had ever since been, and the coverture of the two plaintiffs named was so accordingly pleaded in avoidance of the statute of three and five years' limitations.

In further avoidance of the plea of limitations, the plaintiffs pleaded that the defendants, on their claim of title to the land in controversy, "deraigned title through a forged, pretended deed of conveyance, to-wit, a pretended deed which defendants claim is a transfer of the headright certificate by virtue of which the land in this controversy was patented by the State of Texas to J. H. Chism." (Rec. 8.)

A trial had on the 5th day of May, 1891, resulted in a verdict for the plaintiffs against the defendant Joseph L. White for the entire tract of land in controversy, valued at $10 per acre; for the sum of $750 in favor of said White against the plaintiffs, in accordance with his suggestion of improvements in good faith, said sum being offset by the sum of $350 awarded the plaintiffs for rent of land; and in favor of the defendant Joseph L. White, against the executors of the estate of Baker, for the sum of $3690, with interest at eight per cent annually thereon from October 2, 1887. A judgment was entered in accordance with this verdict, and also in favor of

Joseph L. White against Geo. G. White, under the allegations of these parties, respectively (See Rec. 15, 16, 17.) Of this judgment the defendant Joseph L. White, prosecuting this writ of error, seeks a revision.

The plaintiffs claim the land in controversy as the heirs of J. H. Chism, to whom on November 1, 1838, the board of land commissions for Harrisburg County, in the Republic of Texas, issued the following land certificate, by virtue of which the land in suit was subsequently located, and, on March 17, 1858, patented:

"REPUBLIC OF TEXAS. }
COUNTY OF HARRISBURG }

No. 990. CLASS 2.

This is to certify that J. H. Chism has appeared before us, the board of land commissioners for the county aforesaid, and proved according to law that he arrived in this Republic subsequent to the declaration of independence and previous to August, 1836, and that he is a single man and produced an honorable discharge, is entitled to one-third of a league of land, to be surveyed after the first day of August, 1838.

Given under our hands, at Houston, this 1st day of November, 1838. J. G. HUTCHISON, President.
JOHN WOODRUFF, Associate Commissioner.

Attest: THOS. WM. WARD, Clerk."

The chain of title of the defendant Joseph L. White is as follows: (See Rec. 33 and 46.)

1 The certificate above copied.

2. The patent, dated March 17, 1858, issued by the State of Texas, to J. H. Chism.

3. A certified copy from the records of Harris county of the following transfer, signed J H. Chisholm, to E. M. Robinson:

"Know all men by these presents that I, J. H. Chism, for the sum of one hundred and fifty dollars to me paid by E M. Robinson, do hereby sell, transfer, and convey to the said Robinson, his heirs and assigns forever, my head-right for one-third of a league of land, No.—, dated November, 1838, issued by the board of land commissioners for Harrisburg county, together with the land upon which the same may be located; to have and to hold the same to him, the said Robinson, his heirs and assigns forever, and I agree to warrant and defend the said claim against all claims whatsoever.

Witness my hand and seal, at Houston, December 2nd, 1838.

J. H. CHISHOLM. (Seal.)

Witnesses;

GEORGE W. LIVELY.

J A. SOUTHMAYD."

"REPUBLIC OF TEXAS, }
COUNTY OF HARRISBURG. }

"Before me, Andrew Briscoe, chief justice of Harrisburg county, came J. H. Chisholm, the grantor above, and acknowledged to me that he signed and executed the foregoing deed for the uses and purposes therein contained; to certify which I have hereunto set my hand and seal of the county, at Houston, Dec. 2nd, 1838.

A. BRISCOE,

Chief Justice.

(Seal.)

Recorded October 27, 1852, at 9 o'clock a. m.

W. R BAKER, Clerk.

This instrument was recorded in Hill county, Texas, July 25th, 1888. (Rec. 34.)

4. The proof by W. R. Baker of the execution and loss of the original of this instrument. (See testimony of Baker, Rec. 34, 35, 43.)

5. The original power of attorney from E. M. Robinson to

Wm. R. Baker, authorizing Baker to convey the interest of the grantor in and to all lands in the state of Texas, dated August 28, 1848, recorded in Harris county, October 7, 1852, in other counties at divers dates, and in Hill county, July 18, 1888. (See defendant's chain of title, Rec. 46.)

6. The original deed of E. M. Robinson, by his attorney, W. R. Baker, to J. DeCordova, conveying, among other things, the "J. H. Chisholm certificate for one-third of a league," said deed dated November 4, 1856, and recorded in Harris county January 4, 1859, in other counties at divers dates, and in Hill county July 19, 1888.

7. Original deed from J. DeCordova, dated May 10, 1857, to W. R. Baker, conveying, among other things, the "J H. Chisholm certificate for one-third of a league," recorded in Harris county, January 4, 1859, in divers other counties at different dates, and in Hill county, July 19, 1888.

8. Original deed from W. R. Baker to Geo. G. and J. L. White, conveying the land described in the plaintifis' petition, with general warranty, dated May 20, 1882, duly recorded in Hill county June 1, 1882.

9. Original deed from Geo G. White to Joseph L. White, conveying said land, dated October 6, 1883, recorded in Hill county, October 6, 1883.

The defendant White also relied, under his plea of "not guilty," as a source of title to the certificate, upon the fact that the person holding and claiming it as his own sold and delivered it to Baker for Robinson, under whom defendant claims, and that, without reference to the written transfer, the title thus passed to it as a chattel by sale and delivery. (See testimony of Baker, Rec. 34, 35, 43)

The transfer above set out, signed J. H. Chisholm, to E. M. Robinson, was assailed as a forgery by an affidavit of the attorney of the plaintiffs, filed April 24, 1890, the affidavit being, in effect, that the affiant "believes to be a forgery the original of a certain instrument of writing (describing it as above set out), provided it is claimed by the defendant that the identical party who signed said original conveyance, a copy of which is on file as aforesaid, was J. H. Chism, who received a headright certificate for a third of a league of land from the Republic of Texas, by virtue of his service as a soldier in the war between the Republic of Texas and Mexico; and affiant says under oath that if said certified copy of said conveyance aforesaid is filed in this suit for the purpose of establishing the original thereof, for the purpose of showing a conveyance by said J. H. Chism of his said headright certificate for one-third of a league of land, then he swears that he believes said original conveyance as the act and deed of said J. H. Chism is a forgery." (See Rec. 7 and 8.)

The questions presented are raised by exceptions reserved upon the action of the court in admitting evidence over the objection of the defendant White, and also with reference to the instructions of the court in charges given, and in the refusal of the requested instructions. These questions involve the identity of the person who executed the transfer to E. M. Robinson with the grantee in the original certificate, the genuineness of that transfer, the validity of the sale and delivery to Baker by the holder, and the apparent owner, of the certificate, and the title thereby conveyed, without reference to the identity of the holder with the original grantee, the defense of limitation of five years set up by the defendant White, and the action of the court in limiting the extent of the recovery of interest on his demand against his warrantor Baker.

The following are the assignments of error:

FIRST ERROR ASSIGNED.

"The court erred in permitting the plaintiffs below to introduce in evidence, over the objection of defendants below, the following certified copy of a transfer of bounty warrant:

"REPUBLIC OF TEXAS, }
COUNTY OF HARRISBURG. }

"Be it known that this day before me, John Alexander Newlands, a notary public for the county aforesaid, duly commissioned and qualified, personally appeared the citizen, J. H. Chism, who declared that for and in consideration of the sum of five hundred dollars to him in hand paid by R. B. Dobbins, the receipt of which is hereby acknowledged, he has this day granted, bargained, sold, alienated, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, convey, and confirm, unto the said R. B. Dobbins, his heirs and assigns, a certificate containing twelve hundred and eighty acres of bounty land, granted to him by the Secretary of War on the fifteenth day of September, one thousand, eight hundred and thirty-eight, for services rendered the Government from the 16th day of December, 1836, until the 27th day of May, 1837, as appears by said certificate No. 4298, hereon annexed; to have and to hold said certificate of bounty land to him, the said R. B. Dobbins, his heirs and assigns, forever; and he, the said J. H Chism, for himself, his heirs and assigns, the said bargained certificate, with all the rights thereunto belonging, to the said J. H Chism, his heirs and assigns, shall and will warrant—forever defend against the claims of all persons whatsoever

In testimony whereof he hath hereunto fixed his name and seal, in presence of J G. Hutchison and James L. Eubanks, witnesses of lawful age, and me, the said notary, at the city of Houston, this thirty-first day of October, 1838.

J. H. Chism. (Seal.)

Witnesses:
J. G. Hutchison.
James L. Eubanks"

"To the introduction of the aforesaid transfer in evidence the defendat objected because the fact that J. H. Chisholm signed his name on one occasion 'J. H. Chism' did not show nor tend to show that he did not on another occasion sign his name 'J. H. Chisholm,' the names being idem sonans, and said evidence did not tend to elucidate any issue in this case and was hence immaterial and irrelevant."

SECOND ERROR ASSIGNED.

"The court erred in permitting the plaintiffs below to read in evidence the deposition of Alanson (Augustin) Moreman, wherein said witness said that he 'should say the copy of certificate No. 990, issued to J. H. Chism, which was attached to the interrogatories propounded to him by plaintiffs below, was a copy of the original certificate put in his hands by the father of J. H. Chism.' Defendant below objected to the statement that he 'should say it was the same' being admitted as testimony, as is shown in bill of exceptions No 2."

THIRD ERROR ASSIGNED.

"The court erred in refusing to give to the jury the special charge No. one,asked by Joseph L. White, said special charge as follows:

"Charge No. 1. The uncontroverted evidence in this cause shows that the certificate by virtue of which the land in controversy was located came in the hands of W. R. Baker, as agent of E. M. Robinson, as a purchaser in December, 1838, and that it was thereafter located on the land by Steiner as the agent of Baker, who had acquired the title of Robinson in the same, and if the person who sold the same to Robinson through Baker, under whatever name, was at the time of the sale to Baker the owner of the certificate, you will find a verdict for defendant; and in this connection you are instructed that it is a presumption of fact that a person in possession of a certificate is the owner in the absence of evidence to the contrary, whether he have a written assignment or not, and it is shown by the evidence that the certificate in question was in possession of a person who sold it to him for Robinson recently after it was issued, it having been issued in November, 1838; if you should believe that such person was not the same to whom it was issued, yet, unless the evidence shows that the person to whom it issued had not sold it, you would be authorized to find for the defendant.

"The court having in its general charge (given without request) instructed the jury that on the undisputed proof the jury would find for the plaintiffs unless the grantee in the certificate 990 sold the same in his lifetime, unless, as to Mrs. Van Horn's one-third interest, the plaintiffs were defeated by defendant's plea of the five years' statute of limitations."

FOURTH ERROR ASSIGNED.

"The court erred in refusing to give to the jury the 2nd special charge asked by the plaintiff, Joseph L. White, said charge as follows, being charge No. 2: 'The certificate was issued to a person whose name was spelled therein Chism. The transfer in evidence shows that the person who transferred the same spelled his name Chisholm. Now, if the person who so transferred the certificate was the same to whom it issued, it is not material in what form he signed it, you will find for the defendant; and in determining whether he was the same person you may consider the fact, if a fact, that the person who sold to Baker was a soldier, the date of his certificate, the whereabouts of J. H. Chism about the time, and the evidence introduced by plaintiffs for the purpose of showing where the certificate was, and it is in evidence by plaintiff that J H. Chism was in Texas about the time of the transfer;' which charge was offered in connection with the only charge given by the court on this point, as follows:

“‘The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed J. H. Chisholm, and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiff's recovery of two-thirds of the land sued for; and on this issue as to the person who made the transfer being the same person to whom said certificate No. 990 issued the burden of proof is on the defendant. And if the proof does not so satisfy you the plaintiffs are entitled to recover the whole land unless defeated by the defendants' plea of the five year limitations as to Mrs. Van Horn's one-third interest.’”

FIFTH ERROR ASSIGNED.

“The court erred in refusing to give to the jury special charge No. 3 asked by Joseph L. White, said special charge as follows:

“‘It is shown by the evidence that the certificate has been in the land office since 1857 and is now there, and if the certificate or paper about which plaintiffs testify was burned in Dallas or elsewhere, then the paper testified about by them is not this certificate.’”

SIXTH ERROR ASSIGNED.

“The court erred in refusing to give to the jury the 4th special charge asked by Joseph L. White, said charge as follows:

“‘The transfer introduced by defendant to the certificate is not a forgery in law whether signed by the person who was the owner of said certificate acquired from the person to whom it issued or by the person to whom it issued, and you are instructed that if in this case you should find for the plaintiffs, in any event you will find for the defendant one-third of the land as against M A. Van Horn and the other plaintiffs only two-thirds of the land.'"

SEVENTH ERROR ASSIGNED.

"The court erred in giving to the jury the special charge No. 1 requested by the plaintiffs below, said charge as follows:"

"If you believe from the evidence that W. R. Baker falsely made or caused or procured to be made falsely or in any way aided, assisted, advised or encouraged the false making of the transfer to E. M. Robinson, signed J. H. Chisholm, and purporting to convey the land certificate 990, issued to J. H. Chism, with intent to make valuable thing or money thereby or with intent to set up a claim or title to the land in controversy or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owner of the land, then the said transfer is a forgery, and you will find for plaintiffs for the land in controversy."

EIGHTH ERROR ASSIGNED.

"The court erred in giving to the jury the 2nd and 3rd special charges asked by the plaintiffs below, said charges as follows:"

"Special charge No. 2. 'If you believe from the evidence that a man of the name of J. H. Chisholm, or of any other name, who was not the identical party to whom the certificate No. 990, issued to J. H. Chism, issued did falsely make the transfer to E. M. Robinson, signed J. H. Chisholm, with the intent to make money or other valuable thing thereby or with intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owners of the land or with any fraudulent intent whatever, then said instrument you will find to be a forgery, and you will bring a verdict for plaintiffs for the land in controversy.'" 3

"Special charge No. 3. 'If you believe from the evidence that J. H. Chisholm or any other person not being the identical person to whom certificate 990, in the name of J. H. Chism, issued did falsely counterfeit the original grantee in making the transfer to E. M Robinson, signed J. H. Chisholm, with the intent to make money or other valuable thing thereby or with the intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy or to cast a cloud upon the title or in any way injure, obtain the advantage of, or prejudice the rights of the true owner of the land or with any fraudulent intent whatever, then you will find said instrument a forgery and will find for plaintiffs for the land in controversy.'"

NINTH ERROR ASSIGNED

"The court erred in giving to the jury the following special charge given at the request of plaintiffs below, to-wit:

"'The certificate in this case issued to J. H Chism. Defendant claims through a transfer to E. M. Robinson, signed "J. H. Chisholm." The burden of proof is upon the defendant to show that the man who signed this transfer was the identical man to whom the certificate issued. If he has failed to show this identity you will find for plaintiffs for two-thirds of the land unless you believe from the evidence and under the charge of the court that the transfer above alluded to is a forgery, in which event you will find for the plaintiffs for all the land in controversy.'"

TENTH ERROR ASSIGNED.

"The court erred in giving to the jury the following charge, to-wit:

"'The defendants have offered what purports to be a transfer of the certificate granted J. H Chism to one E. M. Robinson, which transfer is signed "J. H. Chisholm," and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiffs' recovery of two-thirds of the lands sued for; and on this issue, as to the person who made the said transfer being the same person to whom said certificate No. 990 issued, the burden of proof is on the defendant; and if the proof does not so satisfy you the plaintiffs are entitled to recover the whole land unless defeated by the defendant's plea of the five years' statutes of limitation as to Mrs. Van Horn's one-third interest therein.'"

ELEVENTH ERROR ASSIGNED.

"The court erred in the following part of its general charge given to the jury, to-wit:

"The court instructed the jury that if they found for the plaintiffs the whole of the land in controversy they would find for the defendant White against the executors of Baker the sum of $3,960,00, with 8 per cent per annum interest from the 2nd day of October, 1887, to the date of the trial (it being in evidence that that was the amount of the purchase money paid by White to Baker, and this suit having been filed on the 2nd day of October, 1889); and the court also instructed the jury to find for the defendant White the value of his improvements made in good faith, and that if the amount exceeded the value of use and occupation of the premises from the 2nd day of October, 1887, they would find the value of the use and occupation from the time said White took possession not to exceed the value of the improvements and deduct it from the value of the improvements." (Rec. 59-63.)

BRIEF OF THE ARGUMENT WITH STATEMENT OF POINTS OF LAW AND FACTS TO BE DISCUSSED.

We repeat the several assignments of error, with reference to the exceptions appropriate to each and contained in the record, and in connection with what we deem appropriate propositions, statements, and arguments illustrating them.

The First Assignment of Error is as follows:

"The court erred in permitting the plaintiffs below to introduce in evidence, over the objection of defendants below, the following certified copy of a transfer of bounty warrant:

"'REPUBLIC OF TEXAS.
COUNTY OF HARRISBURG

"'Be it known that this day before me, John Alexander Newlands, a notary public for the county aforesaid, duly commissioned and qualified, personally appeared the citizen, J. H. Chism, who declared that for and in consideration of the sum of five hundred dollars to him in hand paid by R B. Dobbins, the receipt of which is hereby acknowledged, he has this day granted, bargained, sold, alienated, conveyed, and confirmed, and by these present doth grant, bargain, sell, alien, convey, and confirm, unto the said R. B. Dobbins, his heirs and assigns, a certificate containing twelve hundred and eighty acres of bounty land, granted to him by the Secretary of War on the fifteenth day of September, one thousand eight hundred and thirty-eight, for services rendered the Government from the 16th day of December. 1836, until the 27th day of May, 1837, as appears by said certificate No. 4298, hereon annexed; to have and to hold said certificate of bounty land to him, the said R. B. Dobbins, his heirs and assigns forever; and he, the said J. H. Chism, for himself, his heirs and assigns, the said bargained certificate, with all the rights thereunto belonging, to the said J. H. Chism, his heirs and assigns, shall and will warrant—forever defend against the claims of all persons whatsoever.

In testimony whereof he hath hereunto fixed his name and seal, in presence of J. G. Hutchison and James L. Eubanks, witnesses of lawful age; and me, the said notary, at the city of Houston, this thirty-first day of October, 1838.

J. H. CHISM. (Seal.)

Witnesses:

J. G. HUTCHISON,

JAMES L. EUBANKS."

"To the introduction of the aforesaid transfer in evidence the defendant objected because the fact that J. H Chisholm signed his name on one occasion 'J. H. Chism' did not show nor tend to show that he did not on another occasion sign his name 'J. H. Chisholm,' the name being idem sonans, and said evidence did not tend to eluciaate any issue in this case and was hence immaterial and irrelevant." (Rec. 59, 60.)

The bill of exceptions (see rec. 31) shows that the introduction of the above instrument was objected to on the ground set out in the assignment, and that the objection was overruled, because "the evidence showed that only two certificates issued to J. H. Chism, one for one-third of a league, now in controversy, and the one for 1280 acres, of which this was a transfer;" and that the transfer was offered to corroborate the witness, M. A. Van Horn, to the effect that J. H. Chism claimed to have sold land in Texas, to show that it was the 1280 acres he had sold; and also to show the price at which it was sold, the date of sale, and that he signed his name "J. H. Chism."

We submit that this testimony was not admissible to corroborate the witness M. A. Van Horn, to the effect that J. H. Chism claims to have sold land in Texas, because the testimony showing this declaration was itself inadmissible, as being mere hearsay. Thus, in Smith V. Shinn, 58 Texas, 1, on a question of identity such as here involved, it was held to have been error, because hearsay, to permit a witness to testify that "he had frequently heard his father say that he had served in the war of 1836." It is improper to permit the introduction of testimony to corroborate evidence which is itself inadmissible and of mischievous effect. The cogency of this suggestion is illustrated, in this connection, when we refer to the evidence of the plaintiff Mary Ann Boling, who testifies that "he (her brother, J. H. Chism) did not claim to have sold any land there (in Texas)," thus clearly contradicting her sister, Mrs Van Horn.

The second ground for admitting this testimony is untenable. If the recital of the consideration of $500 in this transfer, dated October 31, 1838 (a matter which is clearly res inter alias acta) is to be taken as proof of such fact—binding for whatever it is worth upon Baker and his vendees, entire strangers to such a proceeding—it yet is entitled to no weight, because it does not tend to show the absence of such considerations as would impel the grantor on December 2, 1838, to execute a transfer such as the one to Robinson in consideration of $150. In fact, there is no proof—and we apprehend none could have been offered—to show that $150 was not a more reasonable and usual price for such a certificate than $500.

The name "J. H. Chism" and the name "J. H. Chisholm" are idem sonans, the latter being the correct method of spelling the name. They presumptively indicate the same person. (See Worcester's Dictionary, —Appendix; pronunciation of the names of distinguished men, &c. "Chisholm" (Chism.)

Dillahunty vs David, 74 Texas; 344; Russell vs. Oliver, 78 Texas, 11; Flemming vs. Gibbony, 81 Texas, 422; Tevis vs.

Collier, 84 Texas, 638; Lyne vs Sanford, 82 Texas, 58; Lemberg vs. Cabaniss, 75 Texas, 228; Robertson vs. DuBose, 76 Texas, 6; Smith vs. Gillum, 80 Texas, 120; Leland vs, Eckert, 81 Texas, 226; Chamblee vs. Tarbox, 27 Texas, 144; Stebbins vs. Duncan, 108 U. S., 32.

Being idem sonans, the fact that the grantor did sign, or may have signed, his name on one occasion "Chism" neither proves nor tends to prove that he did not sign it "Chisholm" on another occasion, nor does it prove that always and uniformly he signed it "Chism."

It will be noted that, in the body of the transfer to Robinson, for the purpose of assailing which this testimony was used, the grantor refers to himself as "J. H. Chism." This circumstance renders more remote the probability that the signature "J. H. Chisholm' was fraudulently written, and more clearly indicates the immaterial character of the testimony consisting in the copy of the transfer objected to. A signature to an instrument may be ascertained and identified by reference to the name as recited in the deed. Russell vs. Oliver, 78 Texas, 11, 16. Thus, in the case last cited, it was held that a signature to a deed as "Matthew Yarbro" might explain and identify a person referred to by a witness as "Yarbery," and that the recital in the "deed explains the apparent discrepancy." It will be noted that the defendant, and those under whom he claims, were strangers to the instrument thus introduced over his objection. Without notice of its existence until it was offered in evidence, and not permitted to question its genuineness, they were, so to speak, bound with reference to a vital issue in the case by this transaction between other persons, though in no way required by law to take notice of this transfer on file in the land office, which did not concern them or the title to the land in controversy; for private transfers on file in the land office do not operate as notice, especially to one who is a stranger to the title which they concern. Russell vs Oliver, supra.

The Second Assignment of Error is as Follows:

"The court erred in permitting the plaintiffs below to read in evidence the deposition of Alanson (Augustin) Moreman, wherein said witness said that he 'should say the copy of certificate No. 990, issued to J. H. Chism, which was attached to the interrogatories propounded to him by plaintiffs below, was a copy of the original certificate put in his hands by the father of J. H Chism. Defendant below objected to the statement that he 'should say it was the same' being admitted as testimony, as is shown in bill of exceptions No. 2." (Rec 60.)

The defendant's exception No. 2 shows that this testimony, "I should say that the original of which it is a copy was among the papers turned over to me by the father of J. H. Chism" was objected to, because this statement of the witness was indefinite, was a mere opinion, and showed that he was merely guessing at the answer.

We submit that the action of the court in admitting this statement was error, probably most prejudicial to the defense. The statement as a mere inference or conjecture is not admissible. Thus, in the case of McCamant V. Roberts, 80 Texas, 324, on the question of the identity of the person, one Wm. T. Evans, the following testimony was held inadmissible, because it was but an opinion: "From the knowledge I have of Wm. T. Evans, I believe he was the identical person he represented himself to be." The court says: "This answer was inadmissible; it is an opinion, and it was one of the facts in issue and should have been left to the court upon all of the facts in proof." So, in this case, the identity of the original of the copy about which this witness was testifying was one of the facts in issue, and this identity should not have been established by sheer conjecture, such as the language objected to imports. Here, from the fact that certain language seemingly familiar, and certain similar expressions which he recollects to have read in an instrument some forty years before, are encountered in a copy of the instrument presented to him, the witness is permitted to testify to his inference that the former instrument and the original of the copy are the same. This statement of the witness does not rest upon any recollection of the instrument itself, but as an inference "resulting from the operation of his own mind, instead of his personal knowledge of the fact." See State vs. Flanders, 38 N. H., 333. His inference of the identity rests upon the fact that he recognizes certain expressions, as "having an honorable discharge" and "being a single man." If this fact of recognition justified such a conclusion (which we very much question), it was the province of the jury, and not of the witness, to draw the inference. The witness should testify to facts, not to conclusions; and while there are exceptions to this rule, the instrument here objected to does not come within them, because the facts upon which the conclusion rested could well have been explained to the jury. There was nothing peculiar about the copy of the certificate presented to this witness, so subtle as to render it appreciable by the mind of the witness alone, or so unsusceptible of description as to make it unexplainable to the jury; and where the facts on which the conclusion is founded can be explained to the jury, it is not proper to permit a witness to give his impression or opinion. Ives V. Hamlin, 5 Cush , 534; Wiggins V. Holley, 11 Ind., 2; Elbin V. Wilson, 33 Md., 135; Clark V. Fisher, 19 Am. Dec., 402; Clifford V. Richardson, 18 Vt., 626; Stowe V. Bishop, 58 Vt , 498; State vs. Flanders, 38 N. H., 333.

The language on which rests this inference of identity might well have been contained in another paper, such as a certificate of discharge from the army. A certificate of this character will be found on page 49 of the record.

The certificate in question was issued under Sec 29 of the act of the Congress of the Republic of Texas, adopted December 14, 1837. Sayles' Early Laws, Art. 398. This section provided, "that every volunteer who arrived in this Republic after the 2nd day of March, 1836, and before the 1st day of August, 1836, and has received or may hereafter receive an honorable discharge, and has taken the oath prescribed by the constitution, shall receive the quantity of land by this act secured to original colonists." Under the constitution of the Republic, as a single man, the colonist was entitled to a grant of one-third of a league. See Sayles' Early Laws, Art. 219.

As a basis for the issuance of the certificate for land, it was necessary that the applicant should produce a certificate showing "his honorable discharge," and prove that he was "a single man." It is not improbable that such a certificate was handed by Elija Chism to this witness, and that the language thus remembered formed the basis for this conjectural statement. This is doubtless the paper to which the witness refers as the "certificate of discharged soldiers," in connection with the statement, "I only specially remember one paper;" for we submit as a proposition of fact thoroughly settled by other portions of this record, including the testimony of the plaintiffs' remaining witnesses, that this certificate issued to J. H. Chism was never in the possession of the witness Moreman, nor in that of Elija Chism, the father of J. H. Chism.

It is not pretended that more than two certificates for land issued in the name of J. H. Chism, one a bounty warrant for 1280 acres of land, issued September 15, 1838, which, accompanied by the transfer by Chism to R B. Dobbins, dated October 31, 1838, is on file in the Land Office (see testimony of Hall, land commissioner, Rec. 30, 31, 50), the other certificate being the one in question, a headright for one-third of a league. The former, it is admitted, was never taken from Texas to Kentucky. What became of the latter? Mrs. Mary Ann Boling testified: "He (J. H. Chism) brought back (from Texas to Kentucky) a paper showing his discharge from the army, and it remained in his possession up to the time of his death, after which my father had it in his possession, with other papers belonging to my brother My father placed said papers in Mr. Alanson Moreman's care. After a time the papers were returned to my father, and after his death went in possession of my brother-in-law, Wm Van Horn, and my information is that the papers were finally destroyed by fire. * * * One of the papers stated that he was honorably discharged, and that he was an officer * * * After he returned, J. H. Chism again went to Texas. * * * He returned home again about the 1st of November, 1838, and brought back papers showing he was entitled to lands in Texas. To the best of my recollection, there were three papers, but I cannot give any particular description of them, except that one of them was a narrow strip of paper. The word "league" was in one of them, but I don't know in which one or in what place. When he returned from Texas the last time he claimed to own land there, and did not claim to have sold any land there. * * * My father had charge of the papers, a portion of the time, and placed them in the charge of Mr. Alanson Moreman for a time, and Mr. Moreman finally returned them to my father, and they remained in his possession up to the time of his death. They were then placed in the hands of my brother-in-law, Mr Wm. Van Horn, in whose possession, or his son's, they were when destroyed by fire. * * * I read the papers myself. My recollection is that among the papers J. H. Chism brought back from Texas on his second return, one stated that he was entitled to a league of land I saw these papers while they were in his possession, and read them." From the information I had, the papers were destroyed by fire in Texas. (See Rec., pp. 24, 25, 26.)

Mrs. Martha Ann Van Horn testified: "He (J. H. Chism) brought back (from Texas to Kentucky) a paper showing he had been a soldier, and his discharge from the army. * * * He brought back with him the last time papers showing he was entitled to land in Texas. It was a land certificate. * * * My father took steps towards securing the land, and about 1850 sent one Moreman to Texas to secure the land. The papers of J. H. Chism, including those just referred to, (the army discharge and the land certificate) were delivered by my mother to my husband, and by him to me and by me to W. Boon Van Horn, and by him taken to Texas, in order to enable us to recover the land. While in Texas his house was burned, and the papers. * * * My knowledge of the contents of the papers is derived from reading them. * * * I saw the papers while in his (my brother's) possession. Afterwards in my husband's possession. Subsequently I had possession of them, and delivered them to my son, as stated. I read them personally. They have been destroyed." (Rec. 27, 28.)

W. Boon Van Horn testified: "About April, 1873, she, (Martha A. Van Horn) turned over to me papers relating to the claim of J. H. Chism to land in Texas. * * * The character of the papers were a discharge of J. H. Chism as lieutenant, and a certificate showing him to be entitled to land in Texas. The papers were destroyed in Dallas, Texas, by fire, about 1874. There were three papers; one of them a discharge, as stated, another a land certificate, and I am not postive as to what the other was. They related to the honorable discharge of my mother's brother; and of his right to have land in Texas. * * * I know the papers were in my possession a year, possibly two years. * * * I inspected said papers quite a number of times, and made the inspection in 1874. The papers were destroyed in Dallas, Texas, by fire about 1874." (Rec. 27, 28.)

As all the papers, including the certificate, which were delivered to Augustin Moreman, were destroyed by fire in 1874, it follows that the original certificate here in question, which has been on file in the land office since 1857, or January 2, 1858, could not have been recognized by the witness Moreman in the form of an original or of a copy, and that his statement "I should say that the original of which it is a copy was among the papers turned over to me by the father of J. H. Chism," was purely conjectural, inferential, and essentially inadmissible. When we refer to the evidence introduced by the defendant, this conclusion is strengthened, if indeed it can be. The certificate in question was issued by the board of land commissioners of Harrisburg county, November 1, 1838. "Land certificates were then an article of traffic, and were purchased for location on the public lands.' Sayles' Real Estate Laws, Art 238.

W. R. Baker testified: "I saw the original certificate, which transfer (from J. H. Chisholm to E M Robinson) purports to convey. I saw it when it was purchased (December 2, 1838). * * * I was buying land certificates. * * * The soldiers of the Texas army had been discharged in Houston, and they had their bounty lands and headright certificates issued to them. Mr. Chisholm (who had this certificate) appeared to have been a soldier, and had a headright certificate which indicated that he was a soldier. (Rec. 34, 35. * * * I knew a man named J. H. Chisholm, and his name was pronounced as if spelled 'Chism' or 'Chisum.' He represented that was his name, and had a land certificate in that name recently issued by the board of land commissioners of Harrisburg county. (Rec. 43.) * * * I saw the original certificate. It was issued to J. H. Chism for one-third of a league of land. (This is the certificate a copy of which plaintiffs and defendant offered, as above, in evidence.) First, in December, 1838, when I bought it. I last saw it about two weeks since (on file in the general land office) It was in my possession when I bought it in December, 1838. On purchasing it, it was delivered to me by the grantee. It remained in my possession for several years, and until I delivered it for location. * * * I delivered to J M. Steiner this certificate, for the purpose of location, and I have two letters from J. M Steiner, written by him and referring to this certificate, under date of August 29, 1860. I know the handwriting of J. M Steiner, and his signature, having seen him write, and from correspondence with him. Steiner has been dead for several years. (The witness here attaches the two letters referred to from Steiner, the former of which is dated August 29, 1860, in which he informs Baker that he some time ago forwarded the Chism 1476 acre claim, or a patent therefor, and in which he recites the following as the tracts to be divided between himself for locative service and Baker, to wit, Chism one-third league, 1476 acres (and other surveys). In letter of July 22, 1861, J. M. Steiner writes to W. R. Baker, among other things, 'My dear sir: Since our settlement at Houston, I have, in addition to the John Gibson claim which was due you, sent the following: J H. Chism 1476 acres,' and then follows a reference to other claims and patents. In the answer of Baker to Steiner (of which an impress copy of the letter is attached to the deposition) Baker writes with reference to the locative services performed by Steiner for him, and under date of September 17, 1860, as follows: 'According to your statement, our land matters stand as follows: I O. U. for location of J. H. Chism 1476 acres, David Harrison 640 acres, Chas Watson 640 acres, one-third for your share, 2756—total, 918⅔ acres.' " (Rec. 44, 45.)

On January 29, 1840, the Congress of the Republic of Texas passed an act to detect fraudulent land certificates, and to provide for issuing patents to legal claimants Section 1 of this act provided for the appointment of a board of commissioners whose duty it should be, in conjunction with three county commissioners from the respective counties for which they were to act, "to inspect the records of the boards of land commissioners (who had issued certificates in the first instance) and ascertain by satisfactory testimony what certificates for land have been issued by the respective boards to legal claimants, and report as soon thereafter as praticable to the Commissioner of the General Land Office such certificates as they find to be genuine and legal, setting forth in their reports the number and date of the certificates, the quantity of land, and the name of the person to whom issued" (See Vol 1, Art. 740, Sayles Early Laws.) Section 5 forbade the issuance of a patent upon any certificate that "shall not have been * * * made by authority of a certificate returned as genuine and legal by the commissioners appointed by this act, or by authority of a warrant issued for military services after the same shall have been presented to and approved by the Secretary of War, or by authority of a certificate issued by a special act of Congress." (See Sayles' Real Estate Laws of Texas, Art. 238.)

R. M. Hall, Commissioner of the General Land Office of Texas, testified: "There are among the books and papers of the General Land Office of Texas the original of the report of the traveling board provided for by act of Congress of the Republic of Texas on January 29, 1840, to detect fraudulent land certificates, and to provide for issuing patents to legal claimants. Said report was made June 25, 1841, and was received in the General Land Office July 14, 1841 Said report alludes to a second-class certificate issued by the board of land commissioners of Harrisburg County district to J. H. Chisholm, and before described as No. 701, date November 1, 1838, and quantity one-third of a league. Said report does not allude to any second-class certificate issued by said board to J. H. Chism."

The report of this traveling board, as far as pertinent, will be found on page 47 of the record. We submit that the certificate thus referred to and recommended as genuine as No. 701, issued to "J. H. Chisholm, dated 1838, November 1, one-third, second-class," without which no patent could have been subsequently issued, is the same certificate as No. 990, issued to "J H. Chism," and here in controversy. This conclusion rests upon the fact that no certificate in the latter number, and in the name as last spelled, was ever recommended by the board, that the designation "second-class" means, as the Commissioner Hall here testified, that the person to whom the certificate issued "was a volunteer, a single man, and arrived in Texas after March 2, 1836, and before August 1, 1836, and was honorably discharged." The apparent discrepancy in the No. 701, as here recommended, and in the No. 990, as found in the original certificate, is explained in the following language of the report: "* * * We have investigated the above and foregoing claims, and find the same to be genuine claims against the government, and recommend them to the Commissioner of the General Land Office as such, but not issued in conformity with law, as there is no evidence of the applicants' having subscribed to the oath as prescribed by law. We also find that the numbers of the original records do not correspond with the numbers of the certificates, and in order to facilitate the investigation, we have numbered the foregoing claims according to the applications, there being no numbers attached to the applications found on record, or for a portion of the claims." (Rec. 48.) The certificate thus issued as No. 990, in the name of "J H. Chism," and thus recommended as No. 701, in the name of "J. H. Chisholm," was at this date, as Baker testified, in his possession. It was subsequently delivered by him to J. M. Steiner, his agent and representative, and located in Hill County, Texas, the patent issuing by virtue of the foregoing recommendation, and of the location and survey effected by Steiner. Thus the Commissioner Hall testified: "The records of my office show that said certificate No. 990, with field notes, was filed in this office by J. M. Steiner on January 2, 1858. * * * The survey was made, as shown by the field notes, on July 11, 1857. The records show the patent was delivered to J. M. Steiner April 2, 1858. There is what was known as an application book in said office, and its purpose was for easy reference to claims filed in the office, and to ascertain by whom and when filed. Application book No. 4 by its entries show that on January 2, 1858, J~~ames~~ M. Steiner deposited in the General Land Office certificate No. 990, for one-third of a league of land, issued to J. H. Chism, and that said certificate, with field notes, was placed in file 518, Robertson second-class, and patented." (Rec. 32.)

We conclude that the testimony of the plaintiffs' witnesses, especially that of Boon Van Horn, shows that all the papers delivered by Elija Chism to Augustin Moreman, including the "one certificate showing him to be entitled to land in Texas,' were destroyed by fire in Dallas, Texas, about 1874. At that date the original certificate No. 990 was on file in the general land office, having been there deposited by Baker, through his agent Steiner, the certificate having been located on land in Hill county and the patent delivered to Steiner.

We further conclude that the statement of the witness Moreman objected to was pure conjecture and inference. Perforce of this conjecture or inference of identity conflicting positively with the testimony of the plaintiffs' witnesses, especially that of Van Horn, the jury were permitted to conclude that Baker's testimony, showing his possession of the instrument in 1838 and afterwards, until delivered to Steiner (or to DeCordova and subsequently to Steiner), was false; and this on the theory that Ferguson, with whom the witness Moreman left the Chism papers in Austin, as an old acquaintance of his father's then living in Austin, (Rec. 52), and as a gentleman of leisure, who had no place of residence (Rec. 53), had fraudulently disposed of the certificate, or that Baker had purloined it from Ferguson.

The Third Assignment of Error is as Follows:

"The court erred in refusing to give to the jury the special charge No. 1 asked by Joseph L. White, said special charge as follows:

"Charge No 1. 'The uncontroverted evidence in this cause shows that the certificate by virtue of which the land in controversy was located came into the hands of W. R Baker, as agent of E. M. Robinson, as a purchaser, in December, 1838; and that it was thereafter located on the land by Steiner as the agent of Baker, who had acquired the title of Robinson in the same, and if the person who sold the same to Robinson, through Baker, under whatever name, was at the time of the sale to Baker the owner of the certificate, you will find a verdict for defendant; and in this connection, you are instructed that it is a presumption of fact that a person in possession of a certificate is the owner, in the absence of evidence to the contrary, whether he have a written assignment or not, and it is shown by the evidence that the certificate in question was in possession of a person who sold it to him for Robinson recently after it was issued, it having been issued in November, 1838; if you should believe that such person was not the same to whom it was issued, yet, unless the evidence shows that the person to whom it issued had not sold it, you would be authorized to find for the defendant.'

"The court having in its general charge (given without request) instructed the jury that on the undisputed proof the jury would find for the plaintiffs, unless the grantee in the certificate 990 sold the same in his lifetime, unless, as to Mrs. Van Horn's one-third interest, the plaintiffs were defeated by defendant's plea of the five years' statute of limitations." (Rec 60, 61.)

The defendant J. L. White excepted to the action of the court in refusing the special charge referred to in the foregoing assignment, because "the uncontroverted evidence was as stated (in the special instruction), and because the issue, whether the grantee of the certificate may have assigned it to the person from whom Baker testified he received it, was raised by the evidence, and no charge was given by the court upon the point, as to the effect of the possession of the certificate, or that the same could pass by parol." (See exception No. 3, Rec. 54.)

Excluding the statement of the witness Moreman, which we insist was mere inference and was inadmissible, we submit that the uncontroverted testimony shows that the certificate came into the hands of W. R. Baker as agent of E. M. Robinson, as a purchaser, in December, 1838. (See testimony of Baker, quoted under preceding assignment, Rec. 34, 35.) Baker acquired the title of Robinson May 1, 1857 (See Rec. 46.) The certificate was subsequently located on the land in controversy by Steiner, as the agent of Baker. (See testimony of Hall, commissioner, Rec. 32; and testimony of Baker, with letters of Steiner, Rec. 44.)

Baker testified: (Rec. 35.) "I have no memory specially of the man who executed the instrument (transfer from J. H. ~~Chism~~ Chisholm to E. M. Robinson). I bought the certificate and paid him for it. * * * I was buying land certificates from others as well as this."

Under the defendant's plea of not guilty, he was not confined in his proof of title to showing the identity of the grantor in the transfer with the grantee in the original certificate. Nor was he confined to proof of the execution of the written transfer from Chism to Robinson. If the person who had possession of the certificate was the owner, having purchased it mediately or immediately from the original grantee, the title would have passed to Robinson, represented by Baker, though the vendor of the latter was not in fact the original grantee; and this defense is available under the plea of not guilty The statute provides that "under such plea the defendant may give in evidence any lawful defense to the action, except the defense of limitation, which shall be specially pleaded." (Art. 4793, Revised Statutes of Texas.)

Here we contend that the evidence raised the issue, whether the person who sold the certificate to Baker was not the owner, though he may not have been the original grantee, and that as such he passed title by the mere sale and delivery of the certificate This contention is founded on the proposition, that a certificate is a chattel, and that a sale thereof is governed by the law regulating the sale of chattels, and that in the absence of evidence to the contrary, it is a presumption of fact that the person in possession is the owner. In support of these propositions, we cite the following authorities: Abbott's Trial Evidence, 623; Grooms vs. Rust, 27 Texas, 231; Simpson vs. Chapman, 45 Texas, 566; Lindsey vs. Jeffray, 55 Texas, 634; Nelson vs King, 25 Texas, 656; Parker vs. Spencer, 61 Texas, 164; Johnson vs. Newman, 43 Texas, 640; Stone vs Brown, 54 Texas, 334; Cox vs. Bray, 28 Texas, 261; Porter vs. Burnett, 60 Texas, 220; Dodge vs. Litter, 73 Texas, 322; Ikard vs. Thompson, 81 Texas, 290; Sewell vs. Laurance, 2 Posey (Texas) Un. Cs., 379; Ballard vs. Carmichael, 83 Texas, 361.

We submit that the court erroneously in its charge ignored the issue of the sale of the certificate which the jury might have inferred from the possession thereof by the grantor of Baker or Robinson.

Gresham vs. Chambers, 80 Texas, 544, 550; United States vs. Tillottson, 12 Wheat., 180; State of Maryland vs. Baldwin, 112 U. S., 490.

This inference would be strengthened by the presumption authorized from the facts showing possession of the title papers, the location of the land, and the acts of ownership through a long series of years by Baker and those claiming and acting in privity with him. Newby vs. Haltaman, 43 Texas, 317; Ikard vs. Thompson, 81 Texas, 292; Parker vs. Spencer, 61 Texas, 155; Capp vs. Terry, 75 Texas, 401; Gullett vs. O'Connor, 54 Texas, 408; Jackson vs. Deslonde, 1 Posey (Texas) Un. Cs., 674.

The Fourth Assignment of Error is as follows:

"The court erred in refusing to give to the jury the 2nd special charge asked by the plaintiff in error, Joseph L. White, said charge as follows, being charge No. 2: 'The certificate was issued to a person whose name was spelled therein Chism. The transfer in evidence shows that the person who transferred the same spelled his name Chisholm. Now, if the person who so transferred the certificate was the same to whom it was issued, it is not material in what form he signed it, you will find for the defendant; and in determining whether he was the same person you may consider the fact, if a fact, that the person who sold to Baker was a soldier, the date of his certificate, the whereabouts of J. H. Chism about the time, and the evidence introduced by plaintiffs for the purpose of showing where the certificate was, and it is in evidence by plaintiff that J. H. Chism was in Texas about the time of the transfer;' which charge was offered in connection with the only charge given by the court on this point, as follows:

"The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to E. M. Robinson, which transfer is signed J. H. Chisholm, and in order for this transfer to convey title to said certificate, the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant can not defeat the plaintiffs' recovery of two-thirds of the land sued for; and on this issue as to the person who made the transfer being the same person to whom said certificate No. 990 issued the burden of proof is on the defendant;' 'and if the proof does not so satisfy you, the plaintiffs are entitled to recover the whole land, unless defeated by the defendants' plea of the five year limitations as to Mrs. Van Horn's one-third interest'" (Rec. 61.)

The action of the court indicated in the foregoing assignment was excepted to by the defendant White, because the issue presented in the special instruction requested was raised by the evidence, and was ignored by the charge of the court. (See exception No. 4, Rec. 54)

We submit that the defendants were entitled to the instruction here requested. as a fair and impartial charge, required by the un-disputed facts therein enumerated, in ~~In~~ view of the charge given by the court, and imposing upon the defendant the task of satisfying the jury of the identity of J H. Chisholm and J. H. Chism. Thompson on trials, Sec. 2347. The names are idem sonans. See authorities under first assignment, supra.

Baker testified: (see Rec 35) "I have no memory specially of the man who executed the instrument. I bought the certificate, and paid him for it. I knew the man in Houston. I had no acquaintance with him I was buying land certificates from others, as well as this. The soldiers of the Texas army had been discharged in Houston, and they had their bounty land and headright certificates issued to them. Mr. Chisholm appeared to have been a soldier, and had a headright certificate which indicated that he was a soldier,"

The plaintiffs introduced a transfer signed J. H. Chism, in Harrisburg county, Republic of Texas, dated October 31, 1838. (See Rec, 31) The transfer to E. M. Robinson was dated and acknowledged in the same county, December 2, 1838. Mrs. Boling testified: "He (J. H. Chism) returned (from Texas) home again about the 1st of November, 1838."

The Fifth Assignment of Error is as Follows:

"The court erred in refusing to give to the jury special charge No. 3 asked by Joseph L. White, said special charge as follows:

' "It is shown by the evidence that the certificate has been in the land office since 1857 and is now there, and if the certificate or paper about which plaintiffs testify was burned in Dallas or elsewhere, then the paper testified about by them is not this certificate.' " (Rec. 61.)

The defendants were entitled to this instruction, for the reason stated in their exception to the action of the court in refusing it, (see exception No 5, Rec 55) viz., that it was shown by the evidence and the testimony introduced by plaintiffs that the papers which it was claimed by the plaintiffs were with the certificate were burned in Dallas in the year 1874, long after the filing and location of the certificate, and patenting of the land

The undisputed testimony showed that the certificate in question was filed in the General Land Office January 2, 1858, and the testimony of the plaintiffs' witness Mary Ann Boling, M. A. Van Horn, and Boon Van Horn showed that all the papers left by J. H. Chism were burned in Dallas, Texas, in 1874, long after this land had been located and patented, in 1858, Steiner being locator of the land and the agent of Baker. (See testimony of Boling, Rec. 24, 25, 26; Martha Ann Van Horn, Rec. 27, 28; Boon Van Horn, Rec. 29; R. M. Hall, Rec. 30, 32.)

The Sixth Assignment of Error is as Follows:

"The court erred in refusing to give to the jury the 4th special charge asked by Joseph L. White, said charge as follows:

"'The transfer introduced by defendant to the certificate is not a forgery in law, whether signed by the person who was the owner of said certificate acquired from the person to whom it issued or by the person to whom it issued, and you are instructed that if in this case you should find for the plaintiffs, in any event you will find for the defendant one-third of the land as against M. A. Van Horn, and for the other plaintiffs only two-thirds of the land.'" (Rec 62.)

Defendant's exception No. 5 (see Rec. 55) shows that the action of the court in refusing the foregoing special instruction was excepted to, on the ground that, taking the whole evidence into consideration, the issue of forgery was not raised by the evidence, and the uncontroverted facts show that the defendant was entitled to one-third of the land by limitation, unless the transfer of the certificate was a forgery, and the court did submit to the jury the issue as to whether said transfer was forged.

The entire evidence fairly interpreted did not raise the issue of forgery. Had the records of Harris county shown the transfer to Robinson to have been signed J. H. Chism, instead of J. H. Chisholm, the same name spelled in a different way, we submit that not a suspicion even would attach to that transaction to serve as a basis for the conditional affidavit (see rec. 7 and 8) assailing more than fifty years after the date thereof the integrity of that transaction. We invite the attention of the court to all of the evidence in the case in support of this proposition.

Unless the instrument be a forgery, defendant is entitled to hold one-third of the land, under his plea of limitation of five years, because the undisputed evidence shows him, and those in privity with him, to have been holding the land for more than five years under deeds duly recorded, peaceably and adversely, paying the taxes thereon, Mrs. M. A. Van Horn, one of the plaintiffs, and a claimant to a third of the land, not being under disability. (See Rec. 48 and 28.)

The Texas statute on the subject of limitation of five years reads as follows: "Every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating, using and enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards; provided, that this article shall not apply to any one in possession of land, who in the absence of this statute (article) would deraign title through a forged deed; provided further, that no one claiming under a forged deed, or deed executed under a forged power of attorney, shall be allowed the benefits of this article" (Art. 3193, Sayles' Civil Statutes.)

It was not necessary that the deeds under which the defendant held should convey title, in order to serve as a basis for the plea of five years limitation. Hunton vs. Nichols, 55 Texas, 217; Chamberlain vs. Showalter, 5 Civ. App., Tex., 226.

The Seventh Assignment of Error is as follows:

"The court erred in giving to the jury the special charge No. 1 requested by the plaintiffs below, said charge as follows:

" 'If you believe from the evidence that W. R. Baker falsely made or caused or procured to be made falsely or in any way aided, assisted, advised, or encouraged the false making of the transfer to E. M. Robinson, signed J. H. Chisholm, and purperting to convey the land certificate 990, issued to J. H. Chism, with intent to make valuable thing or money thereby or with intent to set up a claim or title or to aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owner of the land, then the said transfer is a forgery, and you will find for plaintiffs for the land in controversy.' " (Rec. 62)

Defendant's exception No. 7 (see Rec. 56) shows that the giving of the foregoing charge was excepted to; (1) because it submitted issues not raised by the evidence, and was calculated, by submitting to the jury whether there was such proof as to the action of Baker, to prejudice the cause of defendant, in support of which Baker's testimony was material and necessary; and (2) because said charge assumes that said transfer was false.

We submit that this instruction was erroneous and prejudicial, 1. Because the evidence, under any aspect thereof, does not justify the belief, assuming the instrument to have been falsely made, that Baker was instrumental in the false making. We again invite the court s attention to the circumstances attending the transaction, as testified to by Baker, and contradicted, we think, neither directly nor circumstantially, and to the testimony disclosing the history of this certificate, its possession by Baker, its location by him or his agent, all of which testimony we have tried to quote in our remarks under the second assignment of error herein. This instruction, thus without support in the evidence, interjecting a false issue into the case, tended unduly to disparage the testimony of the witness Baker, and to injure the defendant White, whose case largely rested upon that testimony. 2. The instruction is glaringly erroneous and prejudicial, because the court therein assumes as a fact "the false making of the transfer to E. M. Robinson.' This is the necessary effect of the following language of the instruction: "If you believe from the evidence that W. R. Baker * * * in any way aided, assisted, advised, or encouraged the false making of the transfer to E M. Robinson, signed J. H. Chisholm," etc. (See Rec. 56.) This charge violates the rule forbidding the court to assume the existence of controverted facts. It was evidently understood by the jury to mean that the instrument in question was falsely made. "Care should be taken to separate the law from the facts, and to leave the latter in unquivocal terms to the jury, as their true and peculiar province." McLanahan vs. Insurance Co., 1 Pet., 170; Thompson on Trials, Sec. 2295.

The charge emphatically tended to mislead, and should require a reversal. Railroad vs. Varnell, 98 U S., 479; Loring vs. Frue, 104 U. S., 223.

The Eighth Assignment of Error is as Follows:

"The court erred in giving to the jury the 2nd and 3rd special charges asked by the plaintiffs below, said charges as follows:

"Special charge No 2. 'If you believe from the evidence that a man of the name of J. H. Chisholm or of any other name who was not the identical party to whom the certificate No. 990, issued to J. H. Chism, issued, did falsely make the transfer to E. M Robinson, signed J. H Chisholm, with the intent to make money or other valuable thing thereby, or with intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owners of the land, or with any fraudulent intent whatever, then said instrument you will find to be a forgery, and you will bring a verdict for plaintiffs for the land in controversy '

"Special charge No. 3. 'If you believe from the evidence that J H. Chisholm, or any other person, not being the identical person to whom certificate No. 990, in the name of J. H. Chism, issued, did falsely counterfeit the original grantee in making the transfer to E M Robinson, signed J. H. Chisholm, with the intent to make money or other valuable thing thereby, or with the intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy, or to cast a cloud upon the title, or in any way injure, obtain the advantage of, or prejudice the rights of the true owner of the land, or with any fraudulent intent whatever, then you will find said instrument a forgery, and will find for plaintiffs for the land in controversy '" (Rec. 62.)

The foregoing special charges were excepted to, as shown by exception No. 8: (Rec. 56) 1. Because special charge No. 2 excluded the hypothesis that some person to whom the grantee in the certificate may have transferred it by delivery, was the person who signed the transfer; 2. Because the charge submitted issues not raised by the evidence, all of the evidence upon that subject being set out hereinbefore; 3. Because charge No. 3 excludes the hypothesis that the assignee of the certificate by the grantee may have been the person who transferred it, and because the issue therein submitted was not raised by the evidence; 4. Because the counterfeiting of the original grantee would not constitute forgery within the meaning of the statute, or forgery which precludes a party—the other necessary facts concurring—from setting up the statute of limitation of five years.

We submit that the definition of forgery as prescribed in foregoing special charge No. 2, with reference to a man by the name of J. H. Chisholm, is not in accordance with the law as it existed at the date of the instrument assailed, nor of the registration of that instrument, and that the instruction was therefore not justified by the testimony. If a man by the name of J H. Chisholm executed the instrument in question, signing it in his name,the act did not constitute forgery, however fraudulent may have been his intention. Such act could not constitute forgery, nor was Chisholm guilty of forgery; because such signing did not purport to be the act of another, and to constitute forgery at the date of the instrument, in 1838, or of its registration, in 1852, that feature was necessary. "As a general rule, however, to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it." Commonwealth vs Baldwin, 11 Gray, (Mass) 198.

Prior to 1876 the penal code of Texas defined forgery as follows: "He is guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument so made, would (if the same be true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever," (Art. 2093, Paschal's Digest of Laws.)

Article 2101, id., prescribes: "The instrument must purport to be the act of "another," and within the meaning of this word, as used in defining forgery, are included this state, the United States, or either of the states or territories of the

Union; all the several branches of the government of either of them; all public and private bodies, politic and corporate; all courts; all officers, public or private, in their official capacity; all partnerships in professions ~~of~~ or trades; and all other persons, whether real or fictitious, except the person engaged in the forgery."

An examination of the foregoing title will fail to disclose that the false counterfeiting of another, save in the manner indicated in the article copied, would constitute the offense of forgery.

In 1876 the Texas legislature passed "An Act to Provide for the Detection and Conviction of all Forgers of Land Titles." (See p. 59, Acts of 1876) By section 1 of that act it was provided that "every person who falsely makes * * * or causes or procures to be falsely made * * * or in any way aids, assists, advises, or encourages the false making * * * or counterfeiting any * * * transfer, assignment, release, conveyance, or title paper * * * with the intent to make money or other valuable thing thereby, or with the intent to set up a claim or title, or aid or assist any one else in setting up a claim or title, to lands * * * or in any way injure, obtain the advantage of or prejudice the interests of the true owners of lands * * * shall be deemed guilty of forgery * * * "

It is apparent that upon this enactment the special instructions criticised are predicated. By it the definition of forgery was extended, and the acts enumerated in the special charges were defined to constitute forgery. We submit, however, that this enactment could not operate retrospectively, and fasten itself to an act performed, or to a document executed, in 1838. If the person executing this instrument was not guilty of forgery at the date of its execution, he could not be made so, nor would the instrument attacked become a forgery, on account of a legislative enactment adopted thirty-eight years thereafter, for such an act would be ex post facto, and void. Constitution of United States, Art. 1, Sec. 9, 10. So it could not affect the rights of one in the civil department of jurisprudence, because of the provision forbidding retrospective legislation. Constitution of Texas, Art 1, Sec. 16.

We conclude that the foregoing two charges were affirmatively incorrect and misleading; that they submitted a phase of the issue of forgery which could arise neither under the pleading nor the evidence, probably most injurious to the defendant, and depriving him of the benefit of his plea of five years' limitation, by authorizing the jury to find that to have been a forgery which could not and did not at the date of the main transaction under the laws of Texas constitute that offense.

Again, it will be noted that the special charge No. 2 proceeds upon the theory that a man of the name of J. H. Chisholm, who was not the identical party to whom the certificate No. 990 issued, actually signed the instrument.

The affidavit assailing the transfer of the certificate as a forgery, attacked it on the condition exclusively that the defendants claim the grantor in the transfer to be the identical party to whom the certificate issued. We submit, therefore, that this instruction denouncing the transfer as a forgery, though there was an absence of such identity, is without basis in the affidavit of forgery; and we submit that the instruction is erroneous, as upon an issue at once outside of the evidence and of the pleadings.

The Ninth Assignment of Error is as Follows:

"The court erred in giving to the jury the following special charge, given at the request of plaintiffs below, to-wit:

"'The certificate in this case issued to J. H. Chism. Defendant claims through a transfer to E. M. Robinson, signed "J. H. Chisholm." The burden of proof is upon the defendant to show that the man who signed this transfer was the identical man to whom the certificate issued If he has failed to show this identity, you will find for plaintiffs for two-thirds of the land, unless you believe from the evidence, and under the charge of the court, that the transfer above alluded to is a forgery, in which event you will find for the plaintiffs for all the land in controversy.' ' (Rec. 62, 63.)

This instruction was erroneous, upon two grounds:

1 It was a re-submission for the third time of the issue of identity, constituting, with the main charge of the court, and with the second special instruction granted at the request of the plaintiff, an argumentative, if not declamatory, iteration of the court's views on an important issue, thus violating the rule forbidding the giving of argumentative instructions. Railway vs. Harriett, 80 Texas, 73; Powell vs. Messer, 18 Texas, 401; Traylor vs. Townsend, 61 Texas, 144; Sec. 2301, Thompson on Trials. And it will be noted, we think, that the several special instructions granted at the request of plaintiffs' counsel, when read in connection with the general charge of the court, in which they are embodied, (see Rec. 12) suggest rather the spirit of the advocate than the "holding of the scales of justice evenly' and impartially.

2. We have already sought to show, that under the plea of not guilty, the defendant was not confined under adequate proof to showing the identity of J. H. Chisholm, signing the transfer to Robinson, with the grantee in the Chism certificate; that even if J. H. Chisholm was not the original grantee, yet the latter might by parol transfer have passed title to Chisholm; and that if Chisholm was in the actual possession of the certificate, the jury might from this infer ownership in him, under the evidence in this case. Not only by its refusal of the defendant's special instruction No. 1, but by the granting of this special instruction, did the court wholly eliminate

this issue from the case, to the detriment of the defendant. (See assignment of error No. 3, supra, and authorities there cited.)

The propositions above stated are covered by the grounds of objection urged in defendant's exception No. 9. (Rec. 57.)

The Tenth Assignment of Error is as Follows:

"The court erred in giving to the jury the following charge, to wit:

"'The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M Robinson, which transfer is signed "J. H. Chisholm," and in order for this transfer to convey title to said certificate, the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiffs' recovery of two-thirds of the lands sued for; and on this issue, as to the person who made the said transfer being the same person to whom said certificate No. 990 issued, the burden of proof is on the defendant; and if the proof does not so satisfy you the plaintiffs are entitled to recover the whole land, unless defeated by the defendant's plea of five years' limitation as to Mrs. Van Horn's one-third interest therein.'" (Rec. 63.)

The foregoing instruction was erroneous, on two grounds:

1. The burden of proving the identity of the person making the transfer referred to with the grantee in the certificate was discharged when the defendant had made this proof by a preponderance of the evidence; and this charge, in requiring the defendant to introduce such an amount of evidence as to satisfy the jury of the identity, exacted a greater degree of evidence than the law imposed upon the defendant to perform that task, especially so when this test was exacted by iteration, both in an affirmative and in a negative sense. Thus in Baines vs. Ullman, 71 Texas, 529, a charge requiring the jury

to be satisfied of a given fact was held to be erroneous, in requiring more than a preponderance of evidence In Emerson vs. Mills, 83 Texas, 385, it is held error to charge that the party having the burden of proof must prove his case to the satisfaction of the jury. So in Railway vs. Bartlett, 81 Texas, 42, it is also held, in effect, that "it is error to impose upon the defendant in a civil case the burden of proving his case to the satisfaction of the jury A preponderance in the evidence is all that is required by the law."

In the case last cited, the court, quoting from Baines vs. Ullman, supra, uses the following language: '"It was not necessary that the evidence should have been sufficient to satisfy the jury of the facts in order to entitle appellant to a verdict, for he could have been entitled to this if upon a consideration of all the evidence the jury had been of the opinion that the facts necessary to a recovery by him were established by a preponderance of the evidence. Evidence is said to satisfy the mind when it is such as frees the mind from doubt, suspense, or uncertainty. The jury may have believed that the evidence preponderated in favor of the existence of the facts which would make the sale of the goods by appellant to his former wife valid against other creditors, yet under the charge the jury would have felt bound to render a verdict against him if their minds were not freed from doubt and uncertainty by the evidence." In Greenleaf on Evidence it is said: 'By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt.' Vol. 1, Sec. 2."

This doctrine is thoroughly established in the courts of this state. Torry vs. Cameron, 73 Texas, 583; Fordyce vs. Chancy. 2 Civ. App , 24; Railway vs. Matula, 79 Texas, 577; McBridge vs Banguss, 65 Texas, 174; Wiley vs. Posey, 71 Texas, 34; Railway vs Brazzil, 72 Texas, 237.

The presumption always obtains that an erroneous instruction is prejudicial, and it must be shown to have been harmless, to avoid a reversal. Railway vs. Greenleaf, 62 Texas, 344; Emerson vs. Mills, 83 Texas, 385.

If this be true ordinarily, a fortiori the rule should apply in this case, where, after the lapse of more than half a century from the occurrence of the main transaction, a defendant in a civil case is required, in effect, to discharge the burden of proof on a given issue by proof, not the result of a preponderance of the evidence, but by "that amount of proof which ordinarily satisfies the unprejudiced mind beyond reasonable doubt." Greenleaf on Evidence, Vol. 1, Sec. 2; Railway vs. Bartlett, 81 Texas, 42.

2. This charge was further erroneous in that it excluded the hypothesis that the certificate might have been transferred by some preson who acquired it from the original grantee by delivery or parol assignment. See assignments 2 and 8, supra, and authorities there cited.

The foregoing propositions are covered by defendant's exception No. 10, and the charge in question. (See Rec 58.)

The Eleventh Assignment of Error is as follows:

"The court erred in the following part of its general charge given to the jury, to-wit:

"The court instructed the jury that if they found for the plaintiffs the whole of the land in controversy, they would find for the defendant White against the executors of Baker the sum of $3960, with 8 per cent per annum interest from the 2nd day of October, 1887, to the date of the trial (it being in evidence that that was the amount of the purchase money paid by White to Baker, and this suit having been filed on the 2nd day of October, 1889); and the court also instructed the jury to find for the defendant White the value of his improvements made in good faith, and that if the amount exceeded the value of use and occupation of the premises from the 2nd day of October, 1887, they would find the value of the use and occupation from the time said White took possession, not to exceed the value of the improvements and deduct it from the value of the improvements." (Rec. 63.)

As under the charge of the court and the verdict of the jury, defendant White was held accountable to the plaintiffs, as the holders of the paramount title, for rents and profits from the time that White took possession in May, 1882, it follows that the latter was entitled to recover from the executors of his warrantor, Baker, the principal of the purchase money, $3690, with interest from May 20, 1882, and the court in its charge erred in limiting the right of the recovery of interest to the period beginning October 2, 1887. In Brown vs. Hearon, 66 Texas, 63, it is held that, where the holder of the paramount title recovers ~~interest~~ rents for a certain period, the warrantor will be entitled to recover interest for same period.

The verdict of the jury found the value of the defendant's improvements to be $750. As this amount exceeded the value of the rents and profits, the jury offset pro tanto the value of the improvements with the rents and profits from the date of White's occupancy, in May, 1882, thus holding White accountable for the mesne profits from that date. (See verdict of the jury, Rec. 15; charge of the court, Rec. 14.)

White purchased the land for the principal sum of $3690 which he paid. He took from Baker a general warranty deed dated May 20, 1882. (See Rec. p. 46.) White took possession in May, 1882. (Rec 48.) Plaintiffs proved the rental value of the land for the seven years before the suit was filed, thus beginning in the year 1882. (Rec. 33.) Defendant proved the cost of the improvements at about $1150. (Rec. 49.) The jury awarded the defendant White $750 as the value of the improvements, and the plaintiffs $350 for rents (Rec. 15.) The court entered a net judgment for the defendant White of $400, for the improvements (Rec. 16); thus, in accordance with the verdict, offsetting the verdict for improvements with that for rents, and charging the defendant White with the rents for the period beginning with May, 1882. The court limited the defendant's recovery of interest against his warrantor to a period beginning October 2, 1887. (Rec 17.)

The articles of the Texas code with reference to assessment of damages for use and occupation, in actions for land, are as follows:

"Where it is alleged and proved that one of the parties is in possession of the premises, the court or jury, if they find for the adverse party, shall assess the damages for the use and occupation of the premises; and if special injury to the property be alleged and proved, the damages for such injury shall be also assessed, and the proper judgment shall be entered therefor, on which execution may issue; but damages shall not be assessed under this article for use and occupation, or for injuries done over two years prior to the commencement of the suit." (Art. 4809, Sayles' Texas Civil Statutes.)

"When the defendant or person in possession has claimed an allowance for improvements in accordance with the provisions of the succeeding chapter, the claim for use and occupation and damages mentioned in the preceding article shall be considered and acted on in connection with such claim by the defendant or person in possession." (Art 4810, Sayles' Civil Statutes.)

"If the sum estimated for the improvements exceed the damages estimated against the defendant and the value of the use and occupation as aforesaid, there shall then be estimated against him, if authorized by the testimony, the value of the use and occupation and the damages for injury done by him, or those under whom he claims, for any time before the said two years, so far as may be necessary to balance the claim for improvements, but no further; and he shall not be liable for the excess, if any, beyond the value of the improvements." (Art. 4815, Sayles' Civil Statutes.)

The action of the court in limiting (see Rec. 14), at the suggestion of plaintiffs, the right to recover interest to the period beginning October 2, 1887, (two years before the institution of the suit) was evidently due the provisions of the article first above copied, but this consideration does not affect the position, that under the article last quoted, the defendant was held accountable to the plaintiffs for the mesne profits during the entire term of his possession, beginning May, 1882, and that consequently, under the doctrine named in Brown vs. Hearon, supra, the defendant White was entitled to recover interest for the term beginning at that date. This doctrine is emphasized in Boone vs. Knox, 80 Texas, 642, where it is held that, where rents are recovered, or setoff against improvements, the warrantor is liable for the interest for the time the rents are recovered.

In this case, W. R. Baker, in the first instance, and after his death his executors, were promptly made defendants, at the instance of the defendant White, and a recovery sought by the latter on the convenant of warranty contained in the deed from Baker to White. This action by the defendant White was proper, under the following article of the Revised Statutes of Texas: "When a party is sued for lands the real owner or warrantor may make himself, or may be made a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action." (Art 4788.)

It is settled doctrine in this state that, where the warrantor has been so impleaded, he may not only be required to defend the title, but the warrantee (without awaiting eviction) is entitled to recover in the same suit on the covenant of warranty the amount of the purchase money, with interest from the date of payment—the interest thus recoverable where the warrantee has been held accountable for rents or mesne profits. Johns vs. Hardin, 81 Texas, 37; Kirby vs. Estill, 75 Texas, 485; Crain vs. Wright, 60 Texas, 515.

The foregoing propositions under this assignment are covered by the eleventh exception reserved. (See Rec. 58.)

We pray that the judgement be reversed, and the cause remanded.

E. H. GRAHAM,
Attorney for Joseph L. White, Plaintiff in Error.
TARLTON & MORROW,
Of Counsel for plaintiff in Error, J. L White.

Office Supreme Court, U. S.
FILED.
MAR 18 1895
JAMES H. McKENNEY,
CLERK.

No. 261.

Cause Pending in the

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

JOSEPH L. WHITE, PLAINTIFF IN ERROR,

VS.

MARTHA ANN VAN HORN ET AL., DEFENDANTS IN ERROR.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF AND ARGUMENT IN BEHALF OF MARTHA ANN VAN HORN AND OTHERS DEFENDANTS IN ERROR.

MORGAN H. BEACH,
Attorney for Martha Ann Van Horn and Others, Defendants in Error.
T. W. GREGORY,
McKINNON & CARLTON,
Of Counsel for Martha Ann Van Horn and Others, Defendants in Error.

HUTCHINGS PRINTING CO., AUSTIN.

No. 261.

Cause Pending in the

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

JOSEPH L. WHITE, Plaintiff in Error,

vs.

MARTHA ANN VAN HORN ET AL., Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF AND ARGUMENT FOR MARTHA ANN VAN HORN ET AL., DEFENDANTS IN ERROR.

The Statement of the Nature and Result of the Suit, as set out in brief of plaintiff in error, is accepted as correct.

Proposition Counter to the First Assignment of Error:

The certified copy of the transfer made by J. H. Chism on October 31, 1838, conveying his bounty warrant for 1280 acres of land to R. B. Dobbins in consideration of $500, was admissible in evidence to corroborate the testimony of the witness M. A. Van Horn to the effect that J. H. Chism claimed to have sold land in Texas, to show that it was the bounty certificate he sold; also to show the price for which it was sold, the date of sale, and that he signed his name "J. H. Chism."

The land certificate or warrant, by virtue of which the land in controversy was located, was issued to J. H. Chism at Houston, Texas, on November 1, 1838, and recites that he arrived in the Republic subsequently to the declaration of independence and previous to August, 1836; that he was a single man and produced an honorable discharge; the certificate was for one-third of a league—1476 acres. (Rec., 22.) A bounty certificate was also issued by the Secretary of War of the Republic of Texas to J. H. Chism for 1280 acres of land, on September 15, 1838, in consideration of services rendered the government from December 16, 1836, to May 27, 1837. (Rec., 30, 31.)

The muster rolls of the Republic show only one J. H. Chism, who was first lieutenant of company A, commanded by Captain Clark L. Owen. (Rec., 30.)

The copy of the transfer under which plaintiff in error claims in this case is signed "J. H. Chisholm," is acknowledged by "J. H. Chisholm," is dated Houston, December 2, 1838, and recites a consideration of $150. (Rec., 33, 34.)

Martha Ann Van Horn, witness for plaintiff in the court below, testified that she was the sister of J. H. Chism; that he returned to Kentucky after the war, and later on went to Texas the second time, for the purpose of "entering up the land to which he was entitled. He returned home again some time thereafter and brought back with him the last time papers showing that he was entitled to land in Texas. It was a land certificate. I do not remember accurately whether the word 'league' occurred in that paper, but think it did. When he returned home from Texas the last time he claimed to own land in Texas, and claimed he had sold some land there." (Rec., 27.)

The paper objected to by plaintiff in error was a certified copy from the General Land Office of Texas of an original transfer on file in that office, in said bounty certificate file, signed "J. H. Chism," bearing date October 31, 1838, at Houston, Texas, and conveying to one R. B. Dobbins the 1280 acre bounty certificate above referred to, in consideration of $500 to him paid by said Dobbins. (Rec., 31.)

"This transfer was offerred in evidence to corroborate witness, M. A. Van Horn to the effect that J. H. Chism claimed to have sold land in Texas, to show that it was the 1280 acres he had sold; also to show the price at which it was sold; the date of sale; and that he signed his name, 'J. H. Chism.'" (Rec., 31, 32.)

The only objection made to it was "because the fact that J. H.

Chism signed his name on one occasion 'J. H. Chism' did not show nor tend to show that he did not on another occasion sign his name 'J. H. Chisholm,' the names being *idem sonans*, and said evidence did not tend to elucidate any issue in this case, and was hence immaterial and irrelevant." (Rec., 31.)

Plaintiff in error claims that this evidence "was not admissible to corroborate the witness M. A. Van Horn to the effect that J. H. Chism claimed to have sold land in Texas, because the testimony showing this declaration was itself inadmissible, as being mere hearsay." It is sufficient to say that the testimony of Mrs. Van Horn on this point, if inadmissible, was not objected to, and having been admitted without objection could be explained if not corroborated. The fact that witness Mary Ann Boling did not hear J. H. Chism state that he had sold land in Texas does not necessarily create any conflict between her testimony and that of Mrs. Van Horn, as suggested by plaintiff in error on page 18 of his brief.

The genuinenesss of the transfer of December 2, 1838, is the controverted point in this case; the original was lost in 1856, while in the possession of W. R. Baker, one of the defendants in the court below, he being also the defendant through whom the others claim (Rec., 34); the subscribing witnesses and officer who took the grantor's acknowledgment had long been dead (Rec., 34); the transfer had been recorded in Harrisburg county (which was not the proper county as will hereinafter be fully shown) by this same W. R. Baker, who was then county clerk of that county (Rec., 34); W. R. Baker claimed that he was present when the transfer signed "J. H. Chisholm" was executed, and in a general way testified to its genuineness (Rec., 34, 35); the testimony of defendants in error attacking the genuineness of this instrument (which will be discussed at length hereafter) was necessarily circumstantial and composed of many details; among other circumstances it was admissible to show that J. H. Chism sold a certificate at Houston for 1280 acres of land on October 31, 1838, for $500, since it tended to establish the value of land certificates at that time and place, and to show that he did not, at the same place on December 2 following, sell a 1476 acre certificate for $150.

The last and most potent reason for admitting this instrument in evidence was to show how J. H. Chism signed his name. The principle of *idem sonans* and the authories cited by plaintiff in error are not applicable in this case; the certificate in controversy was issued to "J. H. Chism," as was the 1280 acre certificate, and the land was patented to "J. H. Chism" (Rec. 22); the muster roll of the Texas army of 1835 and 1836 shows that he enlisted as "J. H. Chism" (Rec., 30); in the family bible, containing a record of births, marriages and deaths since 1790, the name is in every instance spelled "Chism" (Rec. 23); among the archives of the comptroller's office of Texas is a certificate dated June 3, 1837, signed by Gen. Felix Hustin to the effect that "J. H. Chism" was elected first lieutenant of company A, on December 16, 1836, and also a certificate of date December 18, 1836, signed by Col. C. L. Owen to the effect that "James H. Chism" served as sergeant in Captain Rogers' company from June 12, 1836 to December 15, 1836, and also the audited account of "James H. Chism" on which he drew his pay for service as a soldier (Rec., 33); on May 26, 1837, "J. H. Chism" as first lieutenant, company A, First regiment, P. V. certified that John Rogan, a private in Captain Owen's company A had served a certain time for which he had received no pay, and on March 8, 1837, "J. H. Chism" as first lieutenant commanding certified that George Kelley, a private of Capt. Clark L. Owen's company, was honorably discharged (Rec. 49), the original of both certificates being on file among the military vouchers in the office of the comptoller of Texas; the transfer objected to was unquestionably admissible along with the other evidence above set out showing how the family of James H. Chism, his commanding officers, and he himself, both in his official capacity as a commanding officer and as a private individual, wrote and signed his name.

Counsel for plaintiff in error complain in their brief that they had no notice of the existence of this transfer until it was offered in evidence and that they were not permitted to question its genuineness, but as a matter of fact the copy of this instrument offered in evidence was attached to the deposition of R. M. Hall, the commissioner of the General Land Office of Texas, taken April 4, 1890 (Rec., 30), and had been on file in the case over a year when it was tried in May, 1891. (Rec. 15.) The genuineness of the instrument was not questioned in any way or the copy objected to on any grounds except those above set out.

Proposition Counter to the Second Assignment of Error:

There was no error in admitting in evidence that part of the deposition of the witness Moreman in which he testifies that he should say the copy of certificate No. 990 issued to J. H. Chism, which was attached to the interrogatories propounded to him by plaintiffs below, was a copy of the original certificate put in his hands by the father of J. H. Chism, especially since it is fully explained and supported by other portions of the deposition.

One of the most material inquiries in this case is as to the whereabouts of this one-third of a league land certificate from December 2, 1838, the date on which plaintiff in error claims that it was sold and delivered by the grantee to W. R. Baker, as the agent of E. M. Robinson, and July 11, 1857, when it was located by J. M. Steiner (Rec., 30) in Hill county. Baker testified that on December 2, 1838, this land certificate was in Houston, Texas, in the hands of the grantee, a Mr. Chisholm, and was on that day delivered to him as the agent of E. M. Robinson by such person along with the transfer in controversy (Rec., 34, 35); he further testified that the certificate remained in Texas in his hands and those of J. De Cordova as his agent until November 4, 1856, when he (Baker), acting as attorney in fact of E. M. Robinson, sold it to J. De Cordova (Rec., 40), and that J. De Cordova sold it to him (Baker) on May 10, 1857, and returned it to him at the time of the sale or delivered it to Steiner at his request. (Rec., 45.)

If this certificate was not in Texas on December 2, 1838, or from then on until 1850 or 1851, the establishment of this fact would almost conclusively show the fraudulent character of the transfer under which defendants in the court below claimed, and impeach the testimony of defendant W. R. Baker. The evidence introduced by defendants in error to establish this fact is thoroughly and more properly reviewed in this brief in reply to *the Third Assignment of Error*, to which the court is referred for a more detailed statement.

Mary Ann Boling, the sister of J. H. Chism, after testifying as to his return from the war of 1836 with his army discharge, says:

"After he returned home J. H. Chism again went to Texas. I do not remember when, or positively as to his object, but have always been under the impression that it was to see after some land. He returned home again about the first of November, 1838, and brought back papers showing he was entitled to lands in Texas. To the best of my recollection there were three papers, but I cannot give any particular description of them except that one of them was a narrow strip of paper. The word 'league' was in one of them, but I do not know in which one or in what place. When he returned from Texas the last time, he claimed to own land there and did not claim to have sold any land there. He returned about one year previous to his death, on account of bad health. My father had charge of the papers a portion of the time and placed them in the charge of Mr. Alanson Moreman for a time, and Mr. Moreman finally returned them to my father, and they remained in his possession up to the time of his death; they were then placed in the hands of my brother-in-law, Mr. William Van Horn, in whose possession (or his son's) they were when destroyed by fire. My father placed them in the hands of Mr. Moreman in order that he (Moreman) would have the land located. It was agreed that Moreman should either go or send some one to Texas to have the matter arranged. All of the papers left by J. H. Chism in regard to the land were placed in Moreman's charge. My recollection is that in about one year after this my father died." (Rec., 24, 25.) She further testified: "My recollection is, that among the papers J. H. Chism brought back from Texas, on his second return, one stated that he was entitled to a league of land. I saw these papers when they were in his possession and read them. From the information I had the papers were destroyed by fire in Texas. I do not remember by whom they were signed, but remember that the name of Chamberlain was on one of them." (Rec., 26.)

Martha Ann Van Horn, another sister of J. H. Chism, testified that when he returned from Texas the first time "he brought back a paper showing that he had been a soldier and his discharge from the army. This paper was left by him with his mother, and subsequent to his death was turned over by her to deponent's husband. I delivered it with other papers to my son, W. Boon Van Horn, and he took it with him to Dallas, Texas, in order to look up the rights of the heirs with relation to it. He reported to me that his house was burned in Dallas and this paper with others was burned. This paper stated that J. H. Chism had been honorably discharged. I do not remember by whom it was signed. It stated what rank J. H. Chism held, which I think was first lieutenant. It stated that he had been in the service of the United States, that he had been a soldier of the United States. J. H. Chism returned to Texas, after his return home from the army, with the object of entering up the land to which he was entitled. He returned home again some time thereafter, and brought back with him the last time papers showing that he was entitled to land in Texas. It was a land certificate. I do not remember accurately whether the word 'league' occurred in that paper, but think it did. When he returned home from Texas the last time he claimed to own land in Texas, and claimed he had sold some land there. He returned home from Texas about twelve months before his death because he was sick. My father took steps towards securing the land, and about 1850 sent one Moreman to Texas to secure the land. He gave Moreman the papers at the time, and I do not remember how soon after that my father died." (Rec., 27.)

The witness Moreman testified that in 1850 or 1851 the father of J. H. Chism executed a power of attorney and contract at Brandenburg in Meade county, Kentucky, authorizing him to locate in Texas the land to which J. H. Chism was entitled as a soldier of the republic, agreeing to give him one-half of the land so located, and turned over to him the papers relating to the land claim. The witness then continues: "I only especially remember one paper; there were other papers, but I do not remember their purport; I think there was an army discharge among the papers, but cannot say from what army; it was given to J. H. Chism and was made out in his name, but I do not know what rank he held; the last I knew of these papers I delivered them to the mother of J. H. Chism in the latter part of the year 1850 or 1851." (Attached to the interrogatories was a certified copy from the General Land Office of Texas of the one-third league certificate by virtue of which the land in controversy was located.) "I have examined the above copy and should say that the original, of which it is a copy, was among the papers turned over to me by the father of J. H. Chism. The language seems familiar and I recognize some of the terms, as 'having an honorable discharge' and 'being a single man.' The original paper was folded twice and the folds were somewhat frayed with handling, looking like an old paper; the writing was remarkable effeminate. I cannot say definitely whether the original paper was returned to the father or mother of J. H. Chism or not; the last time I ever saw it was in Austin, Texas, in 1850 or 1851 in the month of May. * * * * * As the boat was rounding to take me aboard on my way to Texas by way of New Orleans, Mr. Chism and I were walking down to the boat together and he said, 'do not lose the certificate,' and said that the other papers were of no value without it." (Rec., 52.) The witness then speaks of his visit to Austin, Texas, says he examined the Land Office records and found that Mr. Chism was entitled to one-third of a league of land, that the officials pronounced his papers all regular except the power of attorney, which was acknowleged before the clerk of the circuit court of Meade county, Kentucky, instead of before the Texas commissioner at Louisville; that they refused to recognize his authority on account of this defect and he then left all the papers with an acquaintance in Austin named Ferguson, and returned to Kentucky to have his power of attorney corrected; that about the time of his return the father of J. H. Chism died of cholera, and he then wrote to Ferguson for the papers, and that on receiving them at the post office he gave them to Mrs. Chism without examining them. He then continues: "I last saw the original of the copy of the certificate heretofore referred to in Austin, Texas, in the hands of Mr. Ferguson in 1850 or 1851, this being the last time I *definitely remember* having seen it. It may have been among the papers, I handed Mrs. Chism, but no having opened the papers I cannot say. If the copy of the certificate attached to the interrogatories had not been furnished me I would not have been able to remember *its date, the person by whom it was issued, and the person by whom it was attested.*" (Rec. 52, 53). It will therefore be observed, from the entire testimony of Moreman that he did "especially remember one paper," that he remembered certain expressions in it, as "having an honorable discharge" and "being a single man," that he remembered the manner in which it was folded, that the folds were somewhat frayed with handling, and that the writing was "remarkably effeminate." These things, with the rest of his testimony, show clearly that the expression "I should say it was the same," was not a conjecture resting upon no recollection of the instrument itself as argued by plaintiff in error. This certificate was issued under section 29 of the act of the Republic of Texas, adopted December 14, 1837 (Sayles' Early Laws, Art. 398), which provides "that every volunteer who arrived in this republic after the second day of March, 1836, and before the first day of August, 1836, and has received or may hereafter receive an honorable discharge, and has taken the oath prescribed by the constitution, shall receive the quantity of land by this act secured to original colonists." Under the constitution colonists who were heads of families received one league and one labor of land and single men one-third of a league. (Sayles' Early Laws, Art. 220, sec. 10.) The words "having an honorable discharge" and "being a single man," or words of like import, were therefore peculiar to this class of land certificates. It was not customary, as suggested by plaintiff in error, for the army discharge to state whether or not the soldier was a single man; the form used in such discharges appears in Rec., p. 49.

The law bearing on a case of this kind is very clearly set out by the present chief justice of Texas in the case of Harris v. Nations, 79 Texas, 413, as follows: "What a witness believes as derived from a certain state of facts is but his conclusion and is not evidence. When he has been in position to know the facts but his memory has grown dim, what he thinks he recollects is, if relevant, proper to be admitted and to be weighed in connection with the other testimony in the case." The identical point was passed upon by the supreme court of California in the criminal case of People v. Rolfe, where the court says: "The objection that the witnesses did not positively and beyond a doubt identify the defendant cannot be sustained. They expressed the *belief* that he was the person they had seen, and although their evidence was given with great caution it was sufficiently certain respecting the identity of the defendant to go to the jury, and it was for the jury to say what weight it was entitled to."

First Proposition Counter to the Third Assignment of Error:

The uncontroverted evidence in this cause did not show that the certificate by virtue of which the land in controversy was located came into the hands of W. R. Baker, as agent of E. M. Robinson, as a purchaser, in December, 1838, and the charge was therefore based upon a false assumption, and was properly refused.

Special charge No. 1, asked by plaintiff in error and refused, was as follows:

"The uncontroverted evidence in this cause shows that the certificate by virtue of which the land in controversy was located came into the hands of W. R. Baker, as agent of E. M. Robinson, as a purchaser in December, 1838, and that it was thereafter located on the land by Steiner, as the agent of Baker, who had acquired the title of Robinson in the same, and if the person who sold the same to Robinson through Baker, under whatever name, was at the time of the sale to Baker the owner of the certificate, you will find a verdict for the defendant, and in this connection you are instructed that it is a presumption of fact that a person in possession of a certificate is the owner in the absence of evidence to the contrary, whether he had a written assignment or not, and it is shown by the evidence that the certificate in question was in possession of the person who sold it to him for Robinson recently after it was issued, it having been issued in November, 1838. If you should believe that such person was not the same to whom it was issued, yet unless the evidence shows that the person to whom it was issued had not sold it, you would be authorized to find for the defendant." (Rec., 60, 61.)

The court below, in its general charge to the jury, instructed them that the undisputed proof in the case showed that plaintiffs were the only heirs of the Jas. H. Chism to whom the certificate issued, and "are entitled to recover in this suit, unless said grantee in the certificate 990 sold the same in his lifetime, or as to Mrs. Van Horn's one-third interest that plaintiffs are defeated by the defendant's plea of the five year's statute of limitation." (Rec., 12.) One of the chief issues of fact in this suit was whether or not this land certificate was delivered to W. R. Baker as the agent of E. M. Robinson, in Houston, Texas, on Dec. 2, 1838, and, while it was not essential to the success of defendants in error (plaintiffs in the court below) that this issue should be decided in their favor, the point was one of grave importance in enabling the jury to pass on the character of the transfer of date December 2, 1838, and was hotly contested.

W. R. Baker testified, as set out in detail under the *proposition counter to the second assignment of error*, that on December 2, 1838, land certificate No. 990 was delivered to him as the agent of E. M. Robinson, in Houston, Texas, along with the transfer of that date by the maker thereof, and that it remained in his hands and those of DeCordova and Steiner, until it was deposited in the land office in 1858. The controverting evidence introduced by defendants in error to show that this certificate was carried back to Kentucky by the grantee, J. H. Chism, in November, 1838, and did not reach Texas again until Moreman brought it back in 1851, was composed largely of circumstances and incidents, many of them small in themselves, but, taken all together, constituting a powerful array.

First. Mrs. Boling testified that she was the sister of J. H. Chism, and that when he returned to Kentucky from Texas the second time, he brought back papers showing he was entitled to land in Texas; that she could not give any particular description of the papers, but the word "league" was in one of them; that he claimed to own land in Texas, and that after his death his father placed the papers in the hands of Mr. Moreman, who was to go to Texas and locate the land. (Rec., 24, 25.)

Second. Mrs. Van Horn testified that J. H. Chism returned to Texas, after his return home from the army, with the object of entering up the land to which he was entitled, and that when he returned home the second time he brought back papers showing that he was entitled to land in Texas; that he claimed to own land in Texas and claimed to have sold some there, and brought back with him a land certificate in which she thought the word "league" occurred; that her father took steps towards securing the land, after the death of J. H. Chism, and sent Moreman to Texas with the papers about 1850 for that purpose. (Rec., 27.)

Third. Two land certificates were issued to J. H. Chism by the Republic of Texas, viz.: Bounty Certificate No. 4298 for 1280 acres of land, and headright or second class certificate No. 990 for one-third of a *league* of land (Rec., 30, 31); the bounty certificate was sold by J. H. Chism to R. B. Dobbins on October 31, 1838, at Houston, Texas (Rec., 31); hence the only land certificate he could have taken back to Kentucky, when he returned there from Texas in November, 1838, was the one in controversy in this suit, and the only land certificate ever issued to J. H. Chism in which the word "league" occurs, is likewise the one by virtue of which this land was located.

Fourth. The witness Moreman testified that in 1850 or 1851 the father of J. H. Chism executed a power of attorney and contract authorizing him to locate lands due J. H. Chism as a soldier of the Republic of Texas, and agreeing to give him one-half of the lands so located as compensation; that certain papers relating to the claim of J. H. Chism for this land were turned over to him along with the power of attorney and contract; that he especially remembered only one of the papers; that he thought there was an army discharge among the papers, but could not say from what army or what rank it stated that J. H. Chism held. A certified copy of the one-third league certificate in controversy was attached to the interrogatories, and the witness then stated that he had examined this copy and should say that the original of which it is a copy was among the papers turned over to him by the father of J. H. Chism, that the language seemed familiar, that he recognized some of the terms, as "having an honorable discharge," and "being a single man;" that the original paper was folded twice, the folds were somewhat frayed with handling and the writing was remarkably effeminate; that he could not say definitely whether the original paper was returned to the father or mother of J. H. Chism or not, and that the last time he ever saw it was in Austin, Texas, in May, 1850 or 1851; that as he and Mr. Chism were walking down to the boat which was to take him to New Orleans, on his way to Texas, Mr. Chism said to him, "do not lose the certificate," and told him that the other papers were of no value without it; that he examined the records in the General Land Office at Austin and found that J. H. Chism was entitled to one-third of a league of land, but his power of attorney being acknowledged before the clerk of the circuit court of Meade county, Kentucky, instead of before the Texas commissioner at Louisville, Mr. Pope, the officials of the Land Office refused to recognize it, and he returned to Kentucky to have the defect corrected, leaving the papers given him by Mr. Chism in the hands of a Mr. Ferguson who lived in Austin: that about the time of his return to Kentucky the father of J. H. Chism died with cholera before the defective acknowledgment could be corrected, and the contract being thus ended, he wrote to Ferguson for the papers, received them through the post office and gave them to the mother of J. H. Chism without examining them: that he last examined the papers when he gave them to Ferguson in Austin, Texas, in 1850 or 1851, and that the last time he saw the original certificate was in the hands of Ferguson at that time and place; that it might have been among the papers he handed to the mother of J. H. Chism, but not having opened the papers he could not say.

Plaintiff in error lays great stress on the general statements of Mrs. Van Horn and Mrs. Boling to the effect that these papers were afterwards turned over to W. Boon Van Horn, and his testimony to the effect that they were destroyed by fire when his house was burned in Dallas, Texas, in 1874. It is undoubtedly true that the papers returned to Mrs. Chism by Moreman, including the certificate of honorable discharge from the army, were afterwards given to W. Boon Van Horn and destroyed by fire, and the witnesses very probably assumed that all the papers delivered to Moreman were returned by him and remained together as before—or they may have, and very probably did, confuse the certificate of discharge with the land certificate in speaking of the destroyed papers. After a lapse of so many years absolutely accurate details as to what particular papers were in a bundle of papers relating to the same matter cannot be expected or obtained, and the fact that this one-third league certificate has been on file in the General Land Office since about 1858 shows conclusively, of course, that any supposition on the part of any of these witnesses, in case they had any, that it was still among the papers after Moreman secured their return from Austin, Texas, and was afterwards destroyed by fire, was merely a mistaken one.

Fifth—The most absolute and convincing evidence that this certificate was not in Houston, Texas, on December 2, 1838, and was not delivered along with the transfer of that date is furnished by the transfer itself and the circumstances surrounding its execution.

There are sixth birth marks, or distinguishing features of every land certificate, viz.: (1) its class, (2) the quantity of land for which it issued, (3) its number, (4) the date of its issuance, (5) the name of the person to whom it is issued, and (6) the county from which it was issued.

The certificate in question was (1) a "second class" or "headright," (2) for one-third of a league of land, (3) No. 990, (4) issued November 1, 1838, (5) to J. H. Chism and (6) from Harrisburg county, all of which fully and clearly appeared from the face of the certificate itself (Rec. 22). Baker testified that at the time the certificate was purchased by him for E. M. Robinson he (Baker), was engaged in the business of purchasing land certificates (Rec. 35), and that he or Judge Briscoe, the notary who took the acknowledgment, wrote the transfer of date December 2, 1838, and that the certificate was delivered to him as the agent of E. M. Robinson along with the transfer (Rec. 34). If this was true it was remarkable that the transfer should have described the certificate as No. ——, dated November, 1838, and that it should have been signed by an entirely different name from that of the grantee, thus failing to set out three of the six distinguishing characteristics of the certificate; it will also be observed that no blank *space* is left for the insertion of the number, or the day of the month, showing that the scrivener had exhausted his power of description and did not expect, from data at hand, to insert the number of the certificate and day of month of its issuance.

Sixth—The real reasons for drawing the transfer in the *identical way* in which it was drawn and having it *signed* in the manner in which it was are clearly shown by government archives made up in Houston, Texas, Harrisburg county, and now in the General Land Office of Texas, and these furnish the most convincing proof that the certificate in question was not delivered *along with the transfer* and was not accessible to the party who *drew* the transfer.

In the early days of the Republic of Texas a board of land commissioners existed in each county whose duty it was to pass upon the claims for headrights and issue certificates to those who were entitled to them under the statutes of the republic; the clerk of each board kept its records, and the law required him to make a report of their proceedings to the General Land Office at Austin at the end of every month, giving the names of those to whom certificates were issued, the amount of the land granted and the date of emigration, etc. The Commissioner of the General Land Office was required to keep a record of these reports. (Sayles' Early Laws of Texas, Vol. 1, pp. 262, 263.)

Return No. 11 made to the General Land Office by the clerk of Harrisburg county shows that (1) a second class certificate, (2) for one-third of a league of land, (3) No. 990, (4) was issued November, 1838, (5) to J. H. Chism, (6) by the board of land commissioners of Harrisburg county. (Rec., 32.)

On account of frauds and irregularities in the issuance of land certificates the Congress of the Republic, on January 29, 1840, passed an act creating what was known as the travelling board, whose duty it was to inspect the records and acts of all the boards of land commissioners, "and ascertain by satisfactory testimony what certificates for land have been issued by the respective boards to legal claimants and report as soon thereafter as practicable to the Commissioner of the General Land Office such certificates as they find to be genuine and legal, setting forth in their reports the number and date of the certificates, the quantity of the land, and the name of the person to whom issued. (Sayles' Early Laws of Texas, Vol. 1, p. 385.)

This board made its report on June 14, 1841, it was received in the General Land Office on July 14, 1841, and describes this certificate as (1) a second class certificate, (2) for one-third of a league of land, (3) 701, (4) issued November 1, 1838, (5) to J. H. Chisholm, (6) by the board of land commissioners of Harrisburg county. (Rec., 32 and 47.) These two public records were the only ones in Texas throwing any light upon this certficate, both were defective to some extent, and the labored effort on the part of the scrivener who drew the transfer under discussion to reconcile the conflicting descriptions of the certificate contained in these two reports is as apparent as his ingenuity in doing so is remarkable; both reports describe the certificate as being "second class," for one-third of a league, and issued by the board of land commissioners of Harrisburg county, and the transfer follows these descriptions; one report gives the number of the certificate as *990*, the other gives it as *701*, and the transfer therefore leaves the number blank; one report gives the date of the issuance of the certificate as *November, 1838*, and the other as *November 1, 1838*, and the transfer leaves the day of the month blank; one report spells the name of the grantee *J. H. Chism*, and the other spells it *J. H. Chisholm*, and the transfer spells it *J. H. Chism* in the body of the instrument and *J. H. Chisholm* in the signature and acknowledgment.

How this transfer could have been drawn, executed, and acknowledged in the form it was, with the original certificate before the parties, and delivered with it, is beyond comprehension; it *must* have been drawn with no other descriptive data than that furnished by these two reports, and they furnished the *only accessible data* in case the certificate was in Kentucky.

Seventh. When E. M. Robinson, through his attorney, W. R. Baker, sold this certificate to J. DeCordova, in 1856, and when J. DeCordova sold it to W. R. Baker in May, 1857, it was still erroneously described as the "J. H. Chisholm one-third of a league," that being the only description of it contained in either transfer (Rec. 38 and 41), although W. R. Baker testifies that it was at that very time in his hands and those of DeCordova; it is not until 1860, long after Moreman claims to have left the certificate in Austin, Texas, that Baker begins to describe it as the "J. H. Chism one-third of a league." (Rec., 44, 45.)

Eighth. Section 5 of the act of January 29, 1840, above referred to, was as follows:

"Section 5. That the Commissioner of the General Land Office is hereby prohibited from issuing a patent upon any survey that shall not have been or may hereafter be made by authority of a certificate returned as genuine and legal by the commissioners appointed by this act, or by authority of a warrant issued for military services, after the same shall have been presented to and approved by the Secretary of War, or by authority of a certificate issued by special act of Congress; and any patent issued contrary to the provisions of this act shall be null and void, and the Commissioner of the General Land Office issuing a patent contrary to the provisions of this act, shall be deemed guilty of a high misdemeanor, and, on conviction thereof before the district court, shall be fined in a sum of not less than $5000, etc." (Sayles' Early Laws, vol. 1, p. 387.)

Baker testifies that he was purchasing land certificates in

Houston, the county seat of Harrisburg afterwards Harris county, and the record in this case shows that he was purchasing large numbers of them for Robinson and for himself. (Rec., 38 and 41.)

That he would have failed to present the certificates he held to the Traveling Board when it held its session at his home, in Houston, and secure their approval of same, which was absolutely necessary to make them valid, is hardly possible; the report of the Traveling Board, however, shows conclusively that this certificate was not presented to it, although Baker testified that it was at that time in his possession; the report describes it as *No. 701*, name of applicant *J. H. Chisholm*, of date November 1, 1838, for one-third of a league, and second class; the Board, speaking of this and other certificates, then reports: "We also find that the numbers on the original records do not correspond with the numbers of the certificates, and in order to facilitate the investigation, we have numbered the foregoing claims according to the applications, there being no numbers attached to the applications found on record or to a portion of the claims." (Rec., 47, 48.) Now, as a matter of fact, the original records gave the number of this certificate as *No. 990* (Rec., 32), which was the *correct* number (Rec., 30), and *did correspond* with the number of the certificate, and in case the original certificate was before the board, this erroneous recital would not have occurred in its report, and besides the correct number of the certificate and the correct name of the grantee would have been apparent, and there would have been no necessity for giving it the number of the application.

Ninth. According to the testimony of Baker, heretofore referred to, this certificate remained in his hands, he being a purchaser of land certificates on a considerable scale, from December 2, 1838, to about 1857 (Rec., 44), before it was located; it is a part of the history of Texas that during these twenty years the choice agricultural lands were being eagerly located and patented, and that a professional dealer should have allowed a draft on the public domain for 1476 acres of land to lie idle during such a score of years is improbable and not to be believed.

The question might be asked as to why a fraudulent transfer of a land certificate not in Texas, and not known to be in existence, should have been made, and what profit were the makers to hope for. This is answered by calling the court's attention to the act of the Congress of Texas of January 14, 1840, which provided for the issuance of duplicate land certificates to such persons as applied for them and showed that they were the owners of and had lost the originals. (1 Sayles' Early Laws of Texas, 347, 348.)

The foregoing is sufficient to show to the court that the issue of whether or not this certificate was delivered to W. R. Baker in Houston on December 2, 1838, was fairly raised by the evidence, and other evidence going to show the *mala fides* character of the alleged transaction and the part played therein by W. R. Baker will be called to the court's attention later on.

Second Proposition Counter to the Third Assignment of Error:

The charge asked was argumentative and on the weight of the evidence.

See special charge *No. 1* set out herein immediately after *First Proposition Counter to the Third Assignment of Error.*

Third Proposition Counter to the Third Assignment of Error:

There being no evidence whatever of a verbal transfer of the certificate, the party who executed the transfer to E. M. Robinson claiming therein to be the original grantee, and plaintiff in error and his warrantor Baker claiming through said written transfer, there was no evidence to justify the charge asked and refused.

If it be conceded that there was no issue as to the whereabouts of this certificate in December, 1838, and that the party who signed and acknowledged the transfer in controversy had it in his possession in Houston, still the transfer itself and all of Baker's testimony show that he claimed to be the *original grantee* and not the holder of the certificate by a verbal transfer. The transfer recites that "I, J. H. Chism * * * do hereby sell, transfer and convey to the said Robinson, his heirs and assigns forever, my headright for one-third of a league of land No. —, dated November, 1838, issued by the board of land commissioners of Harrisburg county." W. R. Baker also testified that the maker of this transfer claimed to be the *original grantee.* (Rec., 34, 35.) Baker further testified: "I claimed to own this certificate by virtue of the transfer from J. H. Chisholm to E. M. Robinson, by Robinson, by attorney in fact, to J. De Cordova, and by him to me, and I sold it to J. L. White and ——— White." (Rec., 43.) This being the chain of title by which plaintiff in error claimed the land. (Rec., 46.)

FOURTH PROPOSITION COUNTER TO THE THIRD ASSIGNMENT OF ERROR:

The general charge of the court presented all the correct law covered by the special charge asked and refused.

The court in its general charge instructed the jury that "the undisputed proof in this case shows that the plaintiffs are the heirs and only heirs of the James H. Chism to whom said certificate issued, and are entitled to recover in this suit unless said grantee in the certificate 990 sold the same in his lifetime, or as to Mrs. Van Horn's one-third interest that plaintiffs are defeated by the defendant's plea of the five years' statute of limitation." (Rec., 12.)

FIFTH PROPOSITION COUNTER TO THE THIRD ASSIGNMENT OF ERROR:

The special charge asked and refused erroneously instructs the jury that if they believed that the person who executed the transfer of date December 2, 1838, was not the same to whom it was issued they would still be authorized to find for the defendants below unless the evidence showed that the person to whom the certificate issued had not sold it.

Plaintiffs in the court below having identified themselves as the heirs of J. H. Chism, the original grantee of the certificate and patentee of the land, it was not necessary for them to establish a negative as required by this special charge, viz., show that J. H. Chism had not sold the certificate, but the proof of heirship established at least a *prima facie* case, and it then devolved on defendants in the court below to show that J. H. Chism, or his heirs, had parted with the title. The general charge of the court properly presented the law.

SIXTH PROPOSITION COUNTER TO THE THIRD ASSIGNMENT OF ERROR:

It is not the law that one having possession of a land certificate before location claiming to own the same and dealing with it and treating it as his own is *prima facie* the owner thereof.

The present chief justice of Texas, in delivering the opinion of the Supreme Court of Texas in the case of Shifflet v. Morrelle, 68 Texas, on pages 389 and 390, in commenting upon a requested charge, embodying the reverse of the foregoing proposition, uses this language:

"The possession of personal property is ordinarily *prima facie* evidence of title. The right to appropriate a certain quantity of land from the public domain is personal property, but the certificate is the mere evidence of that right. The mere possession of a muniment of title is not evidence of title in the possessor."

The same doctrine is also announced in the case of Renick & Frazier v. Dawson, 55 Texas, page 108, and also in Smith v. Sublett, 28 Texas, 170, the following language used in the latter being approved in the former:

"A certificate to land unlocated is not an instrument the title to which passes by delivery; the presumption is that it belongs to the assignee and not to the one in whose possession it may be found."

These cases cover the exact point, and none of the authorities cited by plaintiff in error are authority for the contrary.

FIRST PROPOSITION COUNTER TO THE FOURTH ASSIGNMENT OF ERROR:

The second special charge asked by plaintiff in error was properly refused by the court because it was argumentative and on the weight of the evidence.

The charge refused was as follows: "The certificate was issued to a person whose name was spelled therein Chism. The transfer in evidence shows that the person who transferred the same spelled his name Chisholm. Now, if the person who so transferred the certificate was the same to whom it was issued, it is not material in what form he signed it, you will find for the defendant; and in determining whether he was the same person you may consider the fact, if a fact, that the person who sold to Baker was a soldier, the date of his certificate, the whereabouts of J. H. Chism about the time, and the evidence introduced by plaintiff for the purpose of showing where the certificate was, and it is in evidence by plaintiff that J. H. Chism was in Texas about the time of the transfer."

It is submitted that there was no real evidence introduced in this case to show that the party who signed the transfer in controversy *was a soldier*; defendant Baker testified (Rec. 35) in a vague general way that "the soldiers of the Texas army had been discharged in Houston and they had their bounty lands and head-right certificates issued to them." It is a matter of history that the war of 1835–6 had long been over and the Texas soldiers discharged when this transaction purports to have taken place, and the evidence in this case, heretofore reviewed, shows that J. H. Chism had been honorably discharged, had gone back to his home in Kentucky, and after spending a considerable time with his family had returned to Texas. Baker further testified that "Mr. Chisholm appeared to have been a soldier, and had a head-right certificate which indicated that he was a soldier." It will be remembered in this connection that the certificate was issued to J. H. Chism. This was the extent of the evidence relied on to show that the party who executed the transfer was a soldier.

The transfer of the 1280 acre certificate heretofore discussed, showed that J. H. Chism was in Houston on October 31, 1838, and Mrs. Boling testifies that he returned to Kentucky the last time about the 1st of November, 1838 (Rec., 24), and again that he returned "in November, 1838" (Rec., 26.) It was, therefore, not "in evidence by plaintiffs that J. H. Chism was in Texas about the time of the transfer."

Second Proposition Counter to the Fourth Assignment of Error:

The general charge of the court, and the fourth special charge asked by the defendants in error, and given by the court, presented all the correct law covered by the special charge asked and refused.

The court in its general charge instructed the jury as follows:

"You already understand from the statement of the pleadings, the proof, and the argument of counsel that the plaintiffs sue to recover one-third of a league of land described in the pleadings, as the heirs and only heirs of James H. Chism, to whom the board of land commissioners of Harrisburg county issued a land certificate, 990, on which said land was located, and the undisputed proof in this case shows that the plaintiffs are the heirs and only heirs of the James H. Chism, to whom said certificate issued, and are entitled to recover in this suit unless said grantee in the certificate 990 sold the same in his lifetime, or as to Mrs. Van Horn's one-third interest that plaintiffs are defeated by the defendants' plea of the five years' statute of limitation.

"The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed J. H. Chisholm, and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you, the defendants cannot defeat the plaintiffs' recovery of two-thirds of the land sued for; and on this issue, as to the person who made said transfer being the same person to whom said certificate No. 990 issued, the burden of proof is on the defendants; and if the proof does not so satisfy you, the plaintiffs are entitled to recover the whole land unless defeated by the defendants' plea of five years limitation as to Mrs. Van Horn's one-third interest therein." (Rec., 12.)

The fourth special charge asked by defendants in error and given by the court was as follows:

"The certificate in this case issued to J. H. Chism. Defendant claims through a transfer to E. M. Robinson, signed J. H. Chisholm. The burden of proof is upon defendants to show that the man who signed this transfer was the identical man to whom the certificate issued. If he has failed to show this identity, you will find for plaintiffs for two-thirds of the land, unless you believe from the evidence and under the charge of the court that the transfer above alluded to is a forgery, in which event you will find for the plaintiffs for all the land in controversy." (Rec., 14.)

Both of these charges clearly presented to the jury the proposition that if the person who executed the transfer in controversy was the grantee of the certificate, plaintiffs in the court below could not recover.

PROPOSITION COUNTER TO THE FIFTH ASSIGNMENT OF ERROR:

Special charge No. 3 asked by plaintiffs in error was properly refused by the court, because (1), it was argumentative; (2), it was upon the weight of the evidence; (3), it did not instruct the jury as to any law applicable to the case, or as to any law whatever, but merely informed them of a physical fact, that if the certificate was burned in 1874 it was not in existence in 1891; (4), it attempted to invade the province of the jury by instructing them to draw a certain conclusion of fact from certain other facts in case they found such facts to exist.

The charge refused was as follows:

"It is shown by the evidence that the certificate has been in the Land Office since 1857 and is now there, and if the certificate or paper about which plaintiffs testify was burned in Dallas or elsewhere, then the paper testified about by them is not this certificate." (Rec., 55.)

The evidence bearing on the history of certificate No. 990, and the general statements of Mrs. Boling and Mrs. Van Horn that the papers of J. H. Chism were turned over to W. Boon Van Horn and his statement that they were afterwards destroyed by fire are fully reviewed herein under *first proposition counter to the third assignment of error*, to which the court is respectfully referred.

Proposition Counter to the Sixth Assignment of Error:

The court below preperly refused the fourth special charge asked by plaintiff in error, because the evidence clearly raised the issue of forgery.

The charge refused was as follows:

"The transfer introduced by defendant to the certificate is not a forgery in law, whether signed by the person who was the owner of said certificate acquired from the person to whom issued or by the person to whom it was issued, and you are instructed that, if in this case you should find for the plaintiffs, in any event you will find for the defendant one-third of the land as against M. A. Van Horn, and for the other plaintiffs for only two-thirds of the land." (Rec., 56.)

It is claimed by plaintiff in error that "the entire evidence fairly interpreted did not raise the issue of forgery." Under the *proposition counter to the eighth assignment of error* we will discuss the legal question of what is meant by the words "forged deed" as used in the Texas statute of limitation of five years, and whether or not the transfer in controversy would be a *forged deed* under that statute in case it was executed by a person other than the original grantee of the certificate.

Under this proposition we will attempt to show that the evidence not only raised the issue as to whether or not the original grantee of the certificate executed the transfer, but almost conclusively shows that he did not. For convenience the evidence bearing on this point will be grouped into heads, and for brevity preceeding portions of this brief will be referred to instead of repeating them.

I. The transfer is signed by "J. H. Chisholm" and is acknowledged by "J. H. Chisholm," and, while this name and *Chism* are *idem sonans*, it must be presumed that a man knows how to spell his own name, and the evidence conclusively shows that J. H. Chism as an individual, J. H. Chism as a commanding officer in the Texas army, his family for over half a century, his commanding general and his commanding colonel, the board of land commissioners of Harrisburg county and the Secretary of War of the Republic, all spelled his name "Chism;" in addition to this, the name is spelled "Chism" on the muster roll of his company, in the voucher on which he drew his pay as a soldier, in all the records of his family Bible, in both the land certificates issued to him, and in the patents issued by virtue of these certificates; all of which is fully set out under the *Proposition Counter to the First Assignment of Error.* No instance was shown in which the grantee, any member of his family or any other person had ever spelled his name other than "Chism."

II. The testimony established almost beyond question that certificate No. 990 was not delivered to W. R. Baker as the agent of E. M. Robinson in Houston, Texas, on December 2, 1838, but that J. H. Chism took it back to Kentucky prior to that time, and that it was not in Texas again until Moreman brought it out to locate it in about 1851. The evidence on this point is fully discussed under *First Proposition Counter to the Third Assignment of Error*, to which the court is referred.

III. Mary Ann Boling testified that J. H. Chism returned to Kentucky from Texas the second time in November, 1838 (Rec., 26), and if this was true he could not have been in Houston on December 2, 1838, the date of the transfer.

IV. He claimed to own land in Texas when he returned home the second time, as testified to by both his sisters (Rec., 25 and 27), and the 1280 acre certificate having been sold by him to Dobbins (Rec., 31), it must have been the one-third league certificate to which he referred, which conclusion is strengthened by their recollection that the word "league" occured in the land certificate J. H. Chism brought back from Texas the last time (Rec., 27 and 25.)

V. On October 31, 1838, J. H. Chism sold to R. B. Dobbins his 1280 acre certificate for $500 cash at Houston, Texas (Rec., 31), and it is unreasonable to suppose that 62 days later he should have sold a 1476 acre certificate at the same place for only $150.

VI. The details of the original purchase as testified to by Baker and his acts in reference to this certificate between December 2, 1838 and May 10, 1857, when he had secured title to it himself, are of a most suspicious character; Baker testified that he was present when the transfer was executed, that he had no memory specially of the man who executed it, that he knew the man in Houston, that he had no acquaintance with him, that he did not know whether he was a native of Texas or not, or from what county or state he came, or what was the place of his birth, or when he came to Texas; that he knew him only in Houston and did not remember the length of the acquaintance; that he did not remember when or where he first saw him, or how old a man he was, nor could he recall his personal appearance; that he did not remember when he last saw him or what he was doing, or where he was going, or what the condition of his health was, or what finally became of him, or whether he lived or died, or what relations he had, or whether he was a single or married man, and that he did not know the names or addresses of any persons living who knew him. (Rec., 35.)

The transfer was made to one E. M. Robinson whose agent Baker claims to have been; but the personality of Robinson seems clothed in deepest mystery; Baker testified that he was a harness manufacturer, that he owned property in Harris (Harrisburg) county (Rec., 43), that he lived in the state of New York and was not a Texan, and that he was speculating in land certificates in Texas, through his agent Baker, in 1838; he further testified that Robinson was his cousin and that he had no other relatives except him (Baker); that he had known Robinson all his life, that he was living when he last heard of him, some three years before his depositions were taken, and yet no one in Texas except Baker and his family knew him (it will be observed that E. M. Robinson, in case such an individual ever existed, was in Houston on August 28, 1848, when his power of attorney to Baker purports to have been executed). When interrogated as to Robinson's place of residence Baker answered vaguely that his cousin lived in the state of New York, and that "he lived at times at Watertown and Oswego" (Rec., 35); in the power of attorney to Baker, Robinson is described as a "citizen of the state of New York" no county or city being given as his residence, and he does not acknowledge the instrument before the notary, but a witness long since dead, appears before a notary and swears that he saw him sign it, etc. (Rec., 35, 36 and 38); also when Baker, acting as the attorney in fact of Robinson, conveyed certificate No. 990 along with others to De Cordova on November 4, 1856, E. M. Robinson is described as "of the county of——— in the state of New York," and again in the acknowledgment he is spoken of as "of New York." (Rec. 38, 39.) These circumstances taken in connection with the fact that the large number of land certificates sold to De Cordova by Baker as the attorney in fact of Robinson were a few months after re-transferred by De Cardova to Baker individually, go far to show that the elusive Robinson was probably a stalking horse for Baker to hide behind in his fraudulent transactions.

VII. So long as the original transfer was in existence, it would have been an easy task to have shown whether or not it was signed by the original grantee, for the official signatures of Lieutenant J. H. Chism, made while acting as captain of his company, were on file among the archives of the Republic of Texas, at Austin, as heretofore shown; the fact, therefore, that this original instrument was lost by W. R. Baker (Rec., 34) is very significant, but the manner of preserving a copy is still more so. For fourteen years after the alleged execution of the transfer in controversy no apparent use of certificate or transfer was made by W. R. Baker as agent of E. M. Robinson or otherwise; no attempt appears to have been made to locate the land or procure a patent; but in October, 1852, about one year after Moreman testifies that he left the certificate in Austin, Texas, an era of activity commenced—W. R. Baker had become clerk of Harrisburg county, and on October 27, 1852, he in person, in his official capacity as clerk, recorded this transfer in Book R, page 224, of the county records of Harris or Harrisburg county. (Rec., 34.)

There was no reason for recording this instrument in Harris county or elsewhere, for it had not been located and was not until six years later, and then it should have been recorded in that county (Hill) where the location was made, the certificate being, until located, purely personal property. Without entering into a review of our registration laws, we will merely say that the transfer became a title to land when the certificate was located, and the law of Texas is thus correctly set out in the case of Adams v. Hayden, 60 Texas, 226: "It has ever been the settled policy of the State that titles to land shall be recorded in the county where the land is situated. The due and proper registration of a deed to land in this State, therefore, carries with it the idea and involves the necessity of recording it in the county where the land, or at least a part of it, is situated. The registry of it in another or different county, nor the fact that a registry so made was effected under a mistake as to the true locality of the land, will not alter the result nor vary the rule which is exacted by the statute requiring the record to be made in that county where the land is, in fact, situated."

No one was better acquainted with the law than W. R. Baker, who was the recording clerk of one of the oldest counties of the state and a veteran dealer in land certificates. A certified copy of the Harris county record could not of course have been legally recorded in Hill county or elsewhere, it being a mere copy of a copy, but the evident purpose of W. R. Baker was to spread a copy of the transfer on the record books of Harris county, where no one would ever expect to find anything relating to the title to this certificate, and at the proper time he could testify, if necessary, as in this case, that it was a *fac simile* of the original, and that a copy of it was a true copy of the original (Rec. 43); this accessible copy having been secured he then no doubt destroyed the original and thereby removed all direct means of proving its false character. It will be observed that not until July 23, 1888, fifty years after its execution and thirty years after the land had been located and patented to J. H. Chism, was a copy of this transfer taken from the records of Harris county and recorded in Hill county. (Rec., 34.) It was not a valid record, because it was an attempt to record a copy of a copy, but it was the *first time* that W. R. Baker placed any evidence of this transfer where the heirs of J. H. Chism, or any other person would expect to find it or possibly look for it. It will also be observed that about the same time he recorded in Hill county for the first time the other deeds in his chain of title (Rec., 38, 40, 43), showing that he did not openly assert title to the land until 1887 and 1888, which was long after the notary publics and witnesses alleged to have been connected with these transactions up to 1856 and J. De Cordova were dead (Rec. 34, 38 and 40).

VIII. And lastly the court's attention is called to the fact that while W. R. Baker was not backward in making records of this transfer not in accordance with law and copies of it, he never filed the original, or a copy thereof, in the General Land Office of Texas (Rec., 30), where we would most naturally expect to find it, and thereby attempted to establish his claim to it and have the land patented to him as assignee of J. H. Chism or J. H Chisholm.

PROPOSITION COUNTER TO SEVENTH ASSIGNMENT OF ERROR:

Special charge No. 1, given at the request of defendants in error, did not submit issues not raised by the evidence, and did not assume that the transfer in controversy was false, but taken in connection with the general and other special charges asked properly presented one of the issues as to forgery.

The charge in question was as follows:

"If you believe from the evidence that W. R. Baker falsely made or caused or procured to be falsely made or in any way aided, assisted, advised, or encouraged the false making of the transfer to E. M. Robinson, signed J. H. Chisholm, and purporting to convey the land certificate 990, issued to J. H. Chism, with intent to make valuable thing or money thereby or with intent to set up a claim or title or to aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interests of the true owner of the land, then the said transfer is a forgery and you will find for plaintiffs for the land in controversy." (Rec., 13.)

The Statutes of Texas defining forgery, in accordance with which this charge was given, will be fully discussed in answer to the *Eighth Assignment of Error*, to which the court is referred, and in this portion of our argument we will merely attempt to answer the two points raised by plaintiff in error in his "exception No. 7" and discussed by him in his argument, viz., as to whether or not the issue submitted by this charge was raised by the evidence, and whether or not the charge assumed that the transaction was false. On the first point the contention of plaintiff in error is that the evidence, under any aspect thereof, does not justify the belief, assuming the instrument to have been falsely made, that Baker was instrumental in the false-making. In reply to this we refer the court to our presentation of the evidence under the *Proposition Counter to the Sixth Assignment of Error*, and further add that it is almost impossible to imagine this transfer falsely made without knowledge of the fact and participation therein by W. R. Baker, and that the evidence goes far to show that he was the prime mover in and probably the active perpetrator of the whole forgery, if there was one.

On the second point we submit that the general and special charges given, taken together, made it impossible for the jury to conclude that the court meant to say that the transfer in question was falsely made. The entire charge bearing on this phase of the case was as follows:

"Gentlemen: You already understand from the statement of the pleadings, the proof, and the argument of counsel that the plaintiffs sue to recover one-third of a league of land described in the pleadings as the heirs and only heirs of James H. Chism, to whom the board of land commissioners of Harrisburg county issued a land certificate, 990, on which said land was located, and the undisputed proof in this case shows that the plaintiffs are the heirs and only heirs of the James H. Chism to whom said certificate issued and are entitled to recover in this suit unless said grantee in the certificate 990 sold the same in his lifetime, or as to Mrs. Van Horn's one-third interest that plaintiffs are defeated by the defendant's plea of the five years statute of limitation.

"The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed J. H. Chisholm, and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendants cannot defeat the plaintiff's recovery of two-thirds of the land sued for; and on this issue, as to the person who made said transfer being the same person to whom said certificate No. 990 issued, the burden of proof is on the defendants; and if the proof does not so satisfy you the plaintiffs are entitled to recover the whole land unless defeated by the defendants' plea of five years limitation as to Mrs. Van Horn's one-third interest therein. By the statute of limitation of this State any person having exclusive, actual, adverse possession of land under a deed duly recorded, using and enjoying the same for a period of five years and payment of taxes thereon, acquires title to the same and can defeat a recovery by the person who would otherwise be the owner, unless such person in possession, in the absence of such statute of five years limitation, would deraign title through a forged deed, in which case he is not permitted to recover on the plea of the five years' limitation; and the undisputed proof in this case shows that unless the proof satisfies you that said transfer of the certificate offered in evidence on the trial is forged the defendants are entitled to retain one-third of the land in controversy under their said plea of the five years' limitation, and on this issue as to the said transfer being forged or not the burden of proof is on the plaintiffs, and in this connection I give you here these special charges requested by the plaintiffs.

"*Special Charge No. 1 asked by plaintiffs.* If you believe from the evidence that W. R. Baker falsely made, or caused, or procured to be falsely made, or in any way aided, assisted, advised or encouraged the false making of the transfer to E. M. Robinson, signed J. H. Chisholm, and purporting to convey the land certificate No. 990, issued to J. H. Chism, with intent to make money or valuable thing thereby, or with intent to set up a claim or title, or to aid, or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owner of the land, then the said transfer is a forgery, and you will find for plaintiffs for the land in controversy.

"*Special Charge No. 2 asked by plaintiffs.* If you believe from the evidence that a man of the name of J. H. Chisholm or any other name who was not the identical party to whom the certificate No. 990 issued to J. H. Chism did falsely make the transfer to E. M. Robinson signed "J. H. Chisholm," with the intent to make money or other valuable thing thereby, or with intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interests of the true owners of this land, or with any fraudulent intent whatever, then said instrumeut you will find to be a forgery, and you will bring a verdict for plaintiffs for the land in controversy.

"*Special Charge No. 3 asked by plaintiffs.* If you believe from the evidence that J. H. Chisholm or any other person not being the identical person to whom certificate No. 990, in the name of J. H. Chism, issued did falsely counterfeit the original grantee in making the transfer to E. M. Robinson, signed J. H. Chisholm, with the intent to make money or other valuable thing thereby, or with the intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy, or to cast a cloud upon the title or in any way injure, obtain the advantage of, or prejudice the rights of the true owner of the land or with any fraudulent intent whatever, then you will find such instrument a forgery, and you will find for the plaintiffs for the land in controversy.

"*Special Charge No. 4 asked by plaintiffs.* The certificate in this case issued to J. H. Chism. Defendant claims through a transfer to E. M. Robinson, signed J. H. Chisholm. The burden of proof is upon defendants to show that the man who signed this transfer was the identical man to whom the certificate issued. If he has failed to show this identity, you will find for plaintiffs for two-thirds of the land, unless you believe from the evidence and under the charge of the court that the transfer above alluded to is a forgery, in which event you will find for the plaintiffs for all of the land in controversy.

"This last special charge has already been given you in substance in my oral charge."

It will be observed that in the first and second clauses of the general charge, the jury are instructed that if the proof satisfied them, that the person who signed the transfer was the same man to whom the certificate issued it would convey title to the certificate, and in the fourth special charge given the jury are in substance instructed that the burden of proof was on defendants to show that the man who signed the transfer was the identical man to whom the certificate issued, and *if he failed to show this identity*, they were authorized to find for plaintiffs, etc.; the jury could not, therefore, have concluded that the court meant to state to *them as a fact* that the transfer was falsely made. However, the language of special charge No. 1, taken by itself and considered as a whole, does not support the contention of plaintiff in error; after leaving out a portion of the charge, as plaintiff in error does in his *argument*, the remainder might convey the idea that the court considered the transfer falsely made, but the full text shows that the issue of false making or not is clearly left to the jury, the language being as follows: "If you believe from the evidence that W. R. Baker falsely made or caused or procured to be made falsely, or in any way aided, assisted, advised, or encouraged the false making of the transfer to E. M. Robinson," etc.

PROPOSITION COUNTER TO THE EIGHTH ASSIGNMENT OF ERROR: The court did not err in giving to the jury the second and third special charges asked by plaintiffs in the trial court.

The charges in question were as follows:

"*Special Charge No. 2 asked by Plaintiffs.*—If you believe from the evidence that a man of the name of J. H. Chisholm or of any other name who was not the identical party to whom the certificate No. 990 issued to J. H. Chism did falsely make the transfer to E. M. Robinson signed 'J. H. Chisholm,' with the intent to make money or other valuable thing thereby, or with intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of or prejudice the rights or interests of the true owners of this land, or with any fraudulent intent whatever, then said instrument you will find to be a forgery, and you will bring a verdict for plaintiffs for the land in controversy."

"*Special Charge No. 3 asked by Plaintiffs.*—If you believe from the evidence that J. H. Chisholm or any other person not being the identical person to whom certificate No. 990, in the name of J. H. Chism, issued, did falsely counterfeit the original grantee in making the transfer to E. M. Robinson, signed J. H. Chisholm, with the intent to make money or other valuable thing thereby, or with the intent to set up a claim or title or aid or assist any one else in setting up a claim or title to the land in controversy, or to cast a cloud upon the title or in any way injure, obtain the advantage of or prejudice the rights of the true owner of the land, or with any fraudulent intent whatever, then you will find such instrument a forgery, and you will find for the plaintiffs for the land in controversy." (Rec., 13.)

All points raised by this assignment and discussed in the *argument* of plaintiff in error have been fully dealt with herein except the point that the counterfeiting of the original grantee would not constitute forgery within the meaning of the five year statute of limitation.

Counsel for plaintiff in error are mistaken in their assertion that, prior to 1876, article 2093 of Paschal's Digest of Laws, as set out in their *argument*, defined forgery in Texas — the first legislative definition of forgery appears in that article which was a part of the act of August 28, 1856. Article 7 of the plan adopted for the provisional government of Texas, adopted November 13, 1835, provided that

"All trials shall be by jury, and in criminal cases the proceedings shall be regulated and conducted upon the principles of the common law of England; and the penalties prescribed by said law, in case of conviction, shall be inflicted, unless the offender shall be pardoned or fine remitted, for which purpose a reasonable time shall be allowed to every convict to make application to the Governor and Council." (Hartley's Digest of the Laws of Texas, p. 19.)

On December 21, 1836, the Congress of the Republic of Texas passed an act that "all offenses known to the common law of England, as now understood and practiced, which are not provided for in this act, shall be punished in the same manner as known to the said common law." (Hartley's Digest of the Laws of Texas, p. 19.) This last mentioned act did not purport to define *forgery*. (Hartley's Digest of the Laws of Texas, p. 451.)

On January 20, 1840, the Congress of the Republic passed the following act:

"Be it enacted, etc., that the common law of England (so far as it is not inconsistent with the Constitution or the acts of the Congress now in force) shall, together with such acts, be the rule of decision in this Republic, and shall continue in full force until altered or repealed by Congress." The act then proceeds to repeal all laws in force prior to September 1, 1836, except the Constitution and acts of the provisional government. (Hartley's Digest of the Laws of Texas, p. 120.)

There was no further legislation on the subject until the act of August 28, 1856, defining forgery, which is set out in brief of plaintiff in error on page 41, being article 2093 of Paschal's Digest of the Laws of Texas.

It will therefore be observed that the common law definition of forgery prevailed in the Republic of Texas up to August 28, 1856, and as the transfer in controversy appears to have been recorded in 1852 (Rec., 34), and therefore must have been executed prior to that time, these charges must be viewed in connection with the definition of forgery given by the common law, in case the law in force at the time the transfer was executed is to govern.

The common law definition of forgery is "the fraudulent making or alteration of a writing to the prejudice of another man's right." (4 Blacks. Comm., 247.) And the Texas criminal court of last resort, commenting on this definition, says it "is sufficiently comprehensive to embrace every character of writing, official or unofficial, and to render amenable to punishment any person who might concoct, manufacture or alter any instrument whatsoever that could in any manner tend to the prejudice of another's right, provided the same was done with a fraudulent intent." (Rogers v. State, 8 Texas Ct. Crim. App., 403.)

It is submitted that, under the common law definition of forgery, the special charges asked and given were correct; if the maker of the transfer was not the original grantee of the certificate, then the instrument was false and fraudulent, because it states that the maker was J. H. Chism and that he conveys "my headright for one-third of a league of land No. —, dated November, 1838, issued by the board of land commissioners for Harrisburg county;" and the instrument is signed by a name which is *idem sonans* with that of the grantee.

The act of 1876, alluded to on page 42 of the brief of plaintiff in error, is, however, the one on which the special instructions asked and given were mainly predicated. It was "an act to provide for the detection and conviction of all forgers of land titles," and is found on page 59 of the acts of the Legislature of Texas in 1876. In 1879 the present Revised Statutes of Texas were adopted, and the act of 1876 appears therein under the head of "Forgery of Land Titles," in the Penal Code, as follows:

"Article 451. Every person who falsely makes, alters, forges or counterfeits, or causes, or procures to be falsely made, altered, forged or counterfeited, or in any way aids, assists, advises or encourages the false making, altering, forging or counterfeiting any certificates, field-notes, returns, survey, map, plat, report, order, decree, record, patent, deed, power of attorney, transfer, assignment, release, conveyance or title paper, or acknowledgment, or proof for record, or certificate of record belonging or pertaining to any instrument or paper, or any seal official or private, stamp, scroll, mark, date, signature, or any paper, or any evidence of any right, title or claim of any character, or any instrument in writing, document, paper or memorandum, or file of any character whatever in relation to or affecting lands, or any interest in lands in this state with the intent to make money or other valuable thing thereby, or with intent to set up a claim or title, or aid, or assist any one else in setting up a claim or title to lands or any interest in lands, or to prosecute or defend a suit, or aid or assist any one else in prosecuting or defending a suit with respect to lands, or to cast a cloud upon the title, or in any way injure, obtain the advantage of, or prejudice the rights or interests of the true owners of lands, or with any fraudulent intent whatever, shall be deemed guilty of forgery and be punished by imprisonment in the state penitentiary at hard labor not less than five nor more than twenty years."

By this act, as stated by plaintiff in error in his brief, "the definition of forgery (as set out by the act of 1856) was extended, and the acts enumerated in the special charges were defined to constitute forgery."

The original five years statute of limitation was passed Febru-5, 1841, and was as follows:

"He, she, or they, who shall have had five years like peaceable possession of real estate, cultivating, using, or enjoying the same and paying tax there on, if any, and claiming under a deed, or deeds, duly registered, shall be held to have full title, precluding all claims; but shall not bar the government; and saving to the person or persons having superior right and cause of action, the duration of disability to sue arising from nonage, coverture, or insanity." (Paschal's Digest of Laws of Texas, Art. 4623.)

On April 22, 1879, the five year statute of limitation was amended so as to read as follows:

"Every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating and, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued and not afterwards; *provided*, that this article shall not apply to any one in possession of land who in the absence of this statute would deraign title through a forged deed; *provided further*, that no one claiming under a forged deed or deeds executed under a forged power of attorney shall be allowed the benefit of this article." (Acts of 1879, p. 132.) This was carried into the present Revised Statutes and appears therein as article 3193. By the words "forged deed," as used in this statute, is meant such a deed as the laws of Texas existing at the time this act was passed define as a forged deed, and as the act of 1876 was then and still is, in full force and effect, the definition of forgery therein contained was applicable. As before stated, the act of 1876 extending the definition of forgery and the above recited amendment of the five year statute of limitation were both embraced in the Revised Statutes adopted in 1879 and the first defining a forged deed, and the second excluding from its benefits these who claimed under *forged deeds*, the necessary result is that these words used in the second are applicable to and must be interpreted by the first.

It might be argued with much reason that such an instrument as the law existing *at the time of the trial* defines as a forgery would be a *forged instrument* within the meaning of the five year statute of limitation, or that the words should be construed in accordance with what the law was *during the possession of the land*; either argument would sustain the special charges asked as no change has occurred in either statute since 1879, and as there was no possession of this land by the plaintiff in error and those through whom he claimed until 1882. (Rec. 48.) It is a matter of no importance what the law is at the time the instrument attacked as a forgery is recored, and even if it was important it could not effect this case as the transfer in controversy, as heretofore fully shown, was never properly recorded.

It will be observed here in passing that the change in the statute merely related to the remedy, and no possession having commenced prior to 1882, no right could have accrued by limitation and hence none could have been affected by the change n the statute of limitation in 1879.

An examination of the transfer is sufficient to show that if the party who signed it was not the grantee of certificate No. 990, then he counterfeited the grantee in that transaction, and it was a false instrument. If a more detailed definition of what constituted a false instrument was required, then plaintiff in error should have asked a special charge on the subject, and having failed to do so he cannot complain.

As to the assertior of counsel for plaintiff in error on page 43 of their brief to the effect that special charge No. 2 given by the court was upon an issue outside of the *pleadings* we will briefly state: (1) That no pleading whatever was necessary in order to enable plaintiffs in the court below to attack the transfer as a forgery. (2) That plaintiffs' first supplemental petition, in so far as the issue of forgery bears on the question of limitation, avers that

"Said plaintiffs further show that the defendants, on their claim of title to the land in controversy, deraign title through a forged pretended deed of conveyance, to-wit, a pretended deed which defendants claim is a transfer of the head-right certificate, by virtue of which the land in this controversy was patented by the State of Texas to J. H. Chism, and therefore in law said pleas of three and five year's limitation cannot avail; and this they are ready to verify." (Rec., 8, 9.)

(3) The filing of the affidavit attacking the transfer as a forgery was not necessary to raise the issue of forgery.

Art. 2257 of the Revised Statutes of Texas is as follows:

"*Art. 2257. Recorded instruments, evidence when.*—Every instrument of writing which is permitted or required by law to be recorded in the office of the clerk of the county court, and which has been or may be so recorded after being proven or acknowledged in the manner provided by the laws in force at the time of its registration, shall be admitted as evidence without the necessity of proving its execution; *provided*, that the party who wishes to give it in evidence shall file the same among the papers of the suit in which he proposes to use it, at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party, or his attorney of record, and unless such opposite party, or some other person for him, shall, within three days before the trial of the cause, file an affidavit stating that he believes such instrument of writing to be forged. And whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument of writing, recorded as aforesaid, has been lost or that he cannot procure the original, a certified copy of the record of any such instrument shall be admitted in like manner as the original could be."

It will be observed, as stated by the Supreme Court of Texas in Hancock v. Lumber Co., 65 Texas, 232, that:

"The purpose of the provision is * * * to establish a rule of evidence. Under that statute, if an instrument required or permitted by law to be recorded, is acknowledged or proved for record and recorded as the law requires, upon compliance with the other provisions of the law, the original stands as though its execution was proved as at common law, unless an affidavit of forgery be filed; so stands a certified copy, if the inability of the person offering it to produce the original be shown."

As a matter of fact, this transfer was not "recorded as the law requires," as shown under *Proposition Counter to the Sixth Assignment of Error*, and therefore, as affecting even a rule of evidence, no affidavit was necessary, this one being filed merely out of abundant caution. This exact point was decided in Sartor v. Bolinger, 59 Texas, 416, in the following language:

"There can be no doubt of the right of a party to an action of trespass to try title, to attack the genuineness of an instrument offered in evidence by the opposite party, without filing an affidavit of forgery, when the party offering it in evidence has not complied with article 2257 of the Revised Statutes."

PROPOSITION COUNTER TO THE NINTH ASSIGNMENT OF ERROR:

The court below did not err in giving to the jury special charge No. 4 asked by plaintiffs in the court below, because it correctly presented the law on the chief point in the case.

The charge objected to was as follows:

"The certificate in this case issued to J. H. Chism. Defendant claims through a transfer to E. M. Robinson, signed 'J. H. Chisholm.' The burden of proof is upon the defendant to show that the man who signed this transfer was the identical man to whom the certificate issued. If he has failed to show this identity you will find for plaintiffs for two-thirds of the land, unless you believe from the evidence and under the charge of the court that the transfer above alluded to is a forgery, in which event you will find for the plaintiffs for all the land in controversy." (Rec., 14.)

This charge was given by the trial court with the statement to the jury that "this last special charge has already been given you in substance in my oral charge."

It is submitted that this special charge is not an argumentative or declamatory iteration of the court's views on an important issue, as claimed by counsel for plaintiff in error, but is a simple and concise statement of the law applicable to the most important issue in the case, and does not in the most remote way suggest the views of the court on the issue submitted.

Under his *tenth assignment of error* plaintiff in error raises a technical objection to the use of the word "satisfy," by the court, in its general charge, to the effect that in order for the transfer to convey title to said certificate the proof must satisfy them that the person who made the transfer was the same to whom the certificate issued. If the words used in this general charge are subject to objection, which point is hereafter discussed in answer to the *tenth assignment of error*, this special charge, subsequently given, removed the objection, since the language therein used is not subject to the criticism that the jury might have concluded that it exacted a greater degree of evidence than the law imposed upon the defendant below, and it was useful and beneficial for that reason. The second ground of objection to this charge has already been fully discussed under the *propositions counter to the third assignment of error.*

PROPOSITION COUNTER TO THE TENTH ASSIGNMENT OF ERROR:

That portion of the court's charge set out in the tenth assignment of error, taken in connection with what followed, was not subject to objection, and the entire charge taken together properly presented the issue raised.

For the convenience of this court the entire charge bearing on this subject is here repeated, in the order in which it was given, and is as follows:

"Gentlemen—You already understand from the statement of the pleadings, the proof, and the argument of counsel that the plaintiffs sue to recover one-third of a league of land described in the pleadings as the heirs and only heirs of James H. Chism, to whom the board of land commissioners of Harrisburg county issued a land certificate, 990, on which said land was located, and the undisputed proof in this case shows that the plaintiffs are the heirs and only heirs of the James H. Chism to whom said certificate issued, and are entitled to recover in this suit unless said grantee in the certificate 990 sold the same in his life-time, or as to Mrs. Van Horn's one-third interest that plaintiffs are defeated by the defendant's plea of the five years' statute of limitation.

"The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed J. H. Chisholm, and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendants cannot defeat the plaintiff's recovery of two-thirds of the land sued for; and on this issue, as to the person who made said transfer being the same person to whom said certificate No. 990 issued, the burden of proof is on the defendants, and if the proof does not so satisfy you the plaintiffs are entitled to recover the whole land unless defeated by the defendants' plea of five year's limitation as to Mrs. Van Horn's one-third interest therein. By the statute of limitation of this State any person having exclusive, actual, adverse possession of land under a deed duly recorded, using and enjoying the same for a period of five years and payment of taxes thereon, acquires title to the same and can defeat a recovery by the person who would otherwise be the owner, unless such person in possession, in the absence of such statute of five years' limitation, would deraign title through a forged deed, in which case he is not permitted to recover on the plea of the five years' limitation; and the undisputed proof in this case shows that unless the proof satisfies you that said transfer of the certificate offered in evidence on the trial is forged the defendants are entitled to retain one-third of the land in controversy under their said plea of the five years' limitation, and on this issue as to the said transfer being forged or not the burden of proof is on the plaintiffs, and in this connection I give you here these special charges requested by the plaintiffs.

"*Special Charge No. 1 asked by Plaintiffs.*—If you believe from the evidence that W. R. Baker falsely made, or caused or procured to be falsely made, or in any way aided, assisted, advised or encouraged the false making of the transfer to E. M. Robinson signed J. H. Chisholm, and purporting to convey the land certificate No. 990, issued to J. H. Chism, with intent to make money or valuable thing thereby, or with intent to set up a claim or title, or to aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of or prejudice the rights or interests of the true owner of the land, then the said transfer is a forgery and you will find for plaintiffs for the land in controversy.

"*Special Charge No. 2 asked by Plaintiffs.*—If you believe from the evidence that a man of the name of J. H. Chisholm, or any other name, who was not the identical party to whom the certificate No. 990 issued to J. H. Chism did falsely make the transfer to E. M. Robinson signed 'J. H. Chisholm,' with the intent to make money or other valuable thing thereby, or with intent to set up a claim or title, or aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of or prejudice the rights or interests of the true owners of this land, or with any fraudulent intent whatever, then said instrument you will find to be a forgery, and you will bring a verdict for plaintiffs for the land in controversy.

"*Special Charge No. 3 asked by Plaintiffs.*—If you believe from the evidence that J. H. Chisholm, or any other person not being the identical person to whom certificate No. 990 in the name of J. H. Chism issued, did falsely counterfeit the original grantee in making this transfer to E. M. Robinson signed J. H. Chisholm, with the intent to make money or other valuable thing thereby, or with the intent to set up a claim or title, or aid or assist any one else in setting up a claim or title to the land in controversy, or to cast a cloud upon the title or in any way injure, obtain the advantage of or prejudice the rights of the true owner of the land, or with any fraudulent intent whatever, then you will find such instrument a forgery and you will find for the plaintiffs for the land in controversy.

"*Special Charge No. 4 asked by Plaintiffs.*—The certificate in this case issued to J. H. Chism. Defendant claims through a transfer to E. M. Robinson signed J. H. Chisholm. The burden of proof is upon defendants to show that the man who signed this transfer was the identical man to whom the certificate issued. If he has failed to show this identity you will find for plaintiffs for two-thirds of the land, unless you believe from the evidence and under the charge of the court that the transfer above alluded to is a forgery, in which event you will find for the plaintiffs for all of the land in controversy.

"This last special charge has already been given you in substance in my oral charge." (Rec., 12–14.)

The objection to the charge raised by this assignment of error is purely technical in its character, and the whole charge given fairly presents the issue of identity without exacting of plaintiff in error a greater degree of evidence than the law imposed on him. It will be observed that while the word "satisfy" occurs in the court's general charge, the words "believe from the evidence," which are not subject to the most technical objection, are repeatedly used in the special charges which followed, and which were asked by defendants in error on the issue of identity; the fourth special charge especially, in the fairest possible language, presents the very issue and is immediately followed by the following language of the court: "This last special charge has already been given you in substance in my oral charge." It will also be observed that the court, in the latter part of its general charge, instructs the jury that "the undisputed proof in this case shows that, unless the proof *satisfies you* that said transfer of the certificate offered in evidence on the trial is forged, the defendants are entitled to retain one-third of the land in controversy under their said plea of the five years limitation, and on this issue as to the said transfer being forged or not the burden of proof is on the plaintiffs;" from which it will appear that the same degree of evidence complained of by plaintiff in error was exacted from defendants in error to satisfy the burden of proof cast on them of proving the transfer a forgery.

It is true that some of the Texas decisions show that the words *satisfy*, *satisfaction* and *satisfactory* are viewed by our local courts, when found in charges given in civil cases, with marked disfavor; however, in all cases the entire charge is to be taken and considered as a whole, and a case will not be reversed unless it appears that the jury was probably misled as to what was the law. The courts of the United States have adopted a more liberal construction of charges; in the case of Knickerbocker Life Ins. Co. v. Trefz, 14 Otto, 197, being a suit on a life insurance policy, the following charge was assigned as error, and held to fairly submit the question in issue to the jury: "It is for you to determine the extent of the injury received by Mr. Trefz and whether it was of such a character or nature as to make his reply to the interrogatories a falsehood or not. It is for the jury to say from the evidence in regard to the extent, nature and kind of sickness, whether the attack which the insured suffered from was of a character to make his answer 'never sick' a falsehood. The burden of proof is on the defendant. The company sets up the defense and the jury must be *satisfied* from the evidence that the untruth of the statement has been established, otherwise their verdict should be for the plaintiff."

In case of Railway Co. v. Whitton, 13 Wallace, 270, to recover damages for personal injury, the court charged the jury that, before they could find a verdict against the defendant, they must *be satisfied* its employees were guilty of negligence, and that such negligence caused the death of the party whose representatives brought the suit (p. 278), and the Supreme Court commends their charge (p. 290) in the following language:

"Upon these facts the court gave to the jury a clear and full charge upon the duties and responsibilities of the railroad company in crossing the street of the city with its engines and trains, and upon the care, prudence and caution which it was incumbent upon the deceased to exercise in crossing the tracks; and as to the damages which the jury were authorized to find in case they were *satisfied* that the employees of the company had been guilty of negligence and that such negligence had caused the death of deceased."

The opinion of Texas courts on this point is not *a law of Texas* within the meaning of section 721 of the Revised Statutes of the United States and is not binding on this court. The question is one depending upon principles of general law, and is not based on a local statute or usage, nor on any rule of law affecting titles to lands, nor on any principle which has become a settled rule of property. (Hough v. Texas & Pacific R. R. Co. 10 Otto, 226; Boyce v. Tabb, 18 Wall., 548.)

To what we have said may be added that in this case defendant in error was claiming under a transfer from a party who, he claimed, was the original grantee of the certificate, but who spells his name in the transfer differently from the way in which the grantee's name was spelled in the certificate, in the patent and elsewhere; even if the word "satisfy" would ordinarily be objectionable, as used in this charge, it would not be so under the circumstances of this case, for the court might well have required something more than a preponderance of the evidence to establish the identity of J. H. Chisholm with J. H. Chism.

As a general answer to the propositions advanced in the brief of plaintiff in error, we wish, before closing, to call the court's attention to the fact that the jury unquestionably found that the transfer in controversy was executed by a person other than the original grantee of the certificate; and if this was true, then the transfer was falsely made and a forgery, and any formal errors which might have crept into the details of the charges given were harmless errors and did not affect the result.

In answer to the eleventh assignment of error we do not deem it necessary to say more than that it presents an issue in which these defendants in error, who were the plaintiffs in the suit, have not the most remote interest; under the Texas statute, as set out in the opposing brief, defendant White had the right to implead his warrantors and in case judgment was rendered against him for the land, he could take judgment over against them for the purchase money he had paid with interest thereon.

The sole point presented by this assignment is whether White was entitled to interest as against the executors of his warrantor, W. R. Baker, on $3690 at 8 per cent per annum from October 2, 1887, as charged by the court, or from May, 1882, as contended by plaintiff in error.

It will be seen at a glance that this had nothing to do with the main issues in the case, was merely a collateral issue arising between two of the defendants in the court below, and if the trial court erred in its charge on this point, which was followed by the jury (Rec., 16), this court will merely reform the judgment so as to make this $3690 bear interest at the rate of 8 per cent per annum, from May, 1882, instead of from October 2, 1887, as provided in the judgment.

We also call the court's attention to the fact that the charge of the court on this point was not suggested by defendants in error, as asserted on page 50 of opposing brief. (Rec., 14.)

It is submitted that no *material* error, if any, was committed in the trial of this cause, that the judgment is the only just one that could have been rendered under the facts, and we pray this honorable court to affirm the same.

MORGAN H. BEACH,

Attorney for Martha Ann Van Horn and Others, Defendants in Error.

T. W. GREGORY,

McKINNON & CARLTON,

Of Counsel for Martha Ann Van Horn and Others, Defendants in Error.

Office Supreme Court, U. S.
FILED.
APR 8 1895
JAMES H. McKENNEY,
CLERK.

NO. 261.

In the Supreme Court of the United States.

JOSEPH L. WHITE, Plaintiff in Error.

vs.

MARTHA ANN VAN HORN, et al., Defendants in Error.

ARGUMENT OF PLAINTIFF IN ERROR, IN REPLY TO THE BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

E. H. GRAHAM,
Attorney for Jos. L. White, Plaintiff in Error.
TARLTON & MORROW,
Of Counsel for Plaintiff in Error, J. L. White.

NO. 261.

In the Supreme Court of the United States.

JOSEPH L. WHITE, Plaintiff in Error.

vs.

MARTHA ANN VAN HORN, et al., Defendants in Error.

ARGUMENT OF PLAINTIFF IN ERROR, IN REPLY TO THE BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

May it please the Court :

Without undertaking to discuss seriatim the points presented in the briefs of defendants in error, we beg to offer some suggestions in reply to the positions assumed, or to some of tnem, relying as to the remainder upon the sufficiency of our original brief.

With reference to the general charge of the court: This charge, incorporating as it did the several special instructions requested by plaintiffs, did not properly present the issues raised. (For charge, see brief of defendants in error, p. 40.)

It did not properly present the issue of identity.

Under the facts of this case, the court erroneously imposed upon the defendants the burden of proving that the person who made the transfer purporting to be from "J. H. Chisholm" to "E. M. Robinson" was the same man as he to whom the certificate issued. The names J. H. Chisholm and J. H. Chism are *idem sonans*, and presumptively represent the same man.

Flemming v. Gibbony, 81 Tex., 427.

Russell v. Oliver, 78 Tex., 11-16.

When, therefore, the defendants introduced in evidence the transfer signed "J. H. Chisholm," accompanied by proof of its execution by the testimony of W. R. Baker, it was as if they had introduced in evidence a transfer signed "J. H. Chism." If they had introduced a transfer signed "J. H. Chism," it would not have been incumbent upon them, nor did the burden rest upon them, to prove that J. H. Chism executing the instrument to E. M. Robinson was the same man as J. H. Chism to whom the certificate was granted. Under the supposed case, they would have had a right to rely upon the doctrine long recognized in this state, that "ordinarily, similarity of name is sufficient for the identification of the vendor with the purchaser in a preceding deed.

Chamblee v. Tarbox, 27 Tex., 140.

As "Chisholm" and "Chism," by virtue of the doctrine of *idem sonans*, represent on their face the same person, the charge deprived the defendants of the benefits of the presumption thus attaching to the similarity of name.

The defendant White relied upon the statue of five years limitation, as set out in the original brief. To avoid the effect thus pleaded, as to a one-third interest, the plaintiffs filed a supplemental petition or replication, alleging that the transfer referred to was a forgery, accompanied by an affidavit so charging, provided that it was claimed that the party who signed the transfer to Robinson was the identical person to whom the certificate was granted. To avoid the statute, it therefore (after proof made by the defendant that he had held the land under the required conditions) devolved in law upon the plaintiff to prove the instrument in question a forgery in the manner in which it was assailed. Under the facts of this case, it is apparent that the question of idenity is logically the same as the question of forgery; for it is manifest that, if the person executing the transfer to Robinson was the same man as he to whom the certificate was issued, there was and could be no forgery. As the court in its charge treated the issue of identity and that of forgery as distinct, instead of treating them as the same, and as, without qualification, the court instructed the jury that "on this issue as to the person who made said transfer being the same person to whom said certificate No. 990 issued, the burden of proof is on the defendant," it follows that in all probability the defendant White was deprived of the benefit of his plea of limitations by the failure of the court to instruct the jury that the burden was on the plaintiffs, in order to defeat the defendants' limitation, to prove that the man who signed the transfer to Robinson was not the grantee in the certificate.

When limitation is pleaded and *prima facie* established, it becomes necessary, to avoid the defense by invoking an exception to the statute, that the plaintiff should plead and prove the existence of the feature which constitutes the exception. In the absence of such a plea, the defendant will not be permitted to prove the exception; or if he does prove it, the proof will avail him nothing.

Childers vs. Grimm, 57 Texas, 56.

Harvey vs. Cummings, 68 Texas, 607.

The court should have charged the jury that, to avoid the statute of five years' limitation, the burden of proof rested upon the plaintiffs to show that the man who executed the transfer to Robinson was a different man from the original grantee. In other words, on this plea, the burden of proof on the issue of identity was on the plaintiff.

While the court charged that, in order to defeat the plea of limitation as to one-third interest the burden was upon the plaintiffs to prove that the transfer was a forgery, this instruction, as the court thereby indicated a distinction between the issue of identity and the issue of forgery which did not under the facts of this case logically exist, tended all the more to obscure the questions at issue, and thus to mislead the jury to the detriment of the defendants: Besides, on account of the requested instructions given, the imposing upon the plaintiffs of this burden on the issue of forgery was rather formal than substantial.

This is especially noticeable in connection with the second special instruction granted at the request of the plaintiffs.

(See p. 31. Brief of Defendants in Error.) Read this charge as the jury are presumed to have done, in connection with the previous instruction "on this issue as to the person who made said transfer being the same person to whom said certificate No. 990 issued, the burden of proof is on the defendants," and the burden is in effect placed on the defendants to prove that the instrument is not a forgery as in this instruction defined.

Again: in the first special instruction the jury are charged, among other things, that if "W. R. Baker * * * in any way aided the false making of the transfer to E. M. Robinson, signed J. H. Chisholm, and purporting to convey the Land certificate No. 990 issued to J. H. Chism, with intent to set up a claim to the land in controversy, then the transfer is a forgery.

If we apply the definition of forgery as given by Mr. Blackstone as the test of forgery in this instance, and if we concede that the common law was in force at the date when this instrument purports to have been made (December, 1838), and wehn it purports to have been recorded (1852), this charge was most misleading.

Its evident effect (whatever may have been its purpose) was, in case the jury should find the facts before enumerated to be true, to connect Baker with the forgery, and so to destroy his testimony. Now, we submit that Baker may have aided the false making of the transfer in question without being guilty of forgery as defined at common law, because to be so guilty, he must have acted fraudulently, whereas he whether he entertained any intent to defraud. These special instructions are strongly suggestive of a harangue to the jury to find for the plaintiffs, without reference to the necessary ingredients and elements of the offense of forgery as laid down at once at common law and in the statutes of this State. See Shanks vs. State, 25 Tex. Supp., 326.

The charge requested by defendant, the refusal of which is complained of in the third assignment of error, was proper. We adhere to the proposition, that an unlocated certificate is personal property; that like any other chattel, the sale of it is governed by the law regulating chattels; that in the absence of evidence to the contrary, it is a presumption of fact that the person in possession is the owner. We invite a careful perusal of the authorities cited by us to sustain this contention, and to be found on pages 32 and 33 of our original brief.

The last announcement of our appellate courts on this subject will be found in Fisher vs. Ullman, 3 Texas Civil Appeals Reports on page 325. It is there said that "the possession by Ferguson of the certificate, with a blank endorsement thereon, prior to its location, and that he thereafter had it located, unexplained, was prima facie evidence of title in him; and inasmuch as the record discloses no evidence rebutting this, the conclusion of the court that appellees, claiming under Ferguson, connected themselves with this location, must have been the same in the absence of any declaration upon his part as to the nature of his title. *That actual possession of personal property is prima facie evidence of ownership, seems to be the rule everywhere.* Abb. Trial Evidence

623." This view is approved by the Supreme Court of this state, because, as will be seen by reference to the above volume, an application for a writ of error to that court was refused by it.

In Nelson vs. King, 25 Texas, 656, it is said by the Supreme Court that, "the scrip is treated in law as a chattel, and unlike an ordinary title deed, it has a market value like other chattels."

It follows that an unlocated land certificate, under the overwhelming weight of authority in this state, is not, like a deed or a patent, a mere evidence of right or title, but that it is the property itself, an object—especially in earlier days—of barter and sale, and that the law governing the disposition of chattels obtains with all its force to such property; that it may be transferred by parol, and that where it is found in the possession of one who claims it, who locates it and causes the patent to be issued, by virtue of it, the presumption of fact should exist prima facie that such a person was its owner.

We insist that the circumstances relied upon by plaintiffs as contradicting the testimony of Baker that the certificate was delivered to him in 1836, are without weight. The circumstances referred to in the brief of defendants in error, on pp. 11 and 12, as first, second and third, show that but one certificate was carried back to Kentucky by J. H. Chism. The testimony of W. Boone Van Horn shows positively and directly that this certificate was destroyed at Dallas, Texas, about 1874. (See the testimony of this witness, set out on page 24 of appellant's brief.) This witness identifies positively, not inferentially, the land certificate as among the three papers often inspected by him, in his possession a year or two years, and destroyed by fire about 1874. The position of counsel for defendants in error that this statement of Boone Van Horn, their own witness, must be regarded as an assumption, and a confusion of the certificate of discharge with the land certificate, is not true to the record, because that witness himself distinguishes between the land certificate and the discharge as a lieutenant. He will not permit himself to be understood as so confounding these papers. It may be that J. H. Chism took back to Kentucky with him one land certificate, and that this certificate was burned as Van Horn testifies, for in the usual course of barter and sale of such articles which then especially prevailed, he may have traded for a certificate issued to some one else. This theory finds color under the statement of Mrs. Bowling, that according to her recollection, J. H. Chism brought back from Texas on his second return a paper showing that he was entitled to a league of land. (See Tr., p. 26.)

Be this as it may, it is impossible, under this evidence of Boone Van Horne, that Chism took with him the certificate in question in this case. The reading of Moreman's testimony will show that the review of it by counsel for defendants in error is partial and one-sided. How does it happen that Moreman found, on examination of the records in the land office, that J. H. Chism was entitled to one-third of a league (see Tr. 52), if he had already in his possession the certificate showing that fact? This witness nowhere directly or expressly testifies that he remembers this instrument. He states that he wrote to Ferguson for these papers, that the latter sent them to him as requested, and that he turned them over to Mr. Chism. He is unable to give a copy of the papers, or to tell who executed them or witnessed them, or their dates. He testifies that the original paper was folded twice, and that the writing was remarkably effeminate, but it is not shown that these appearances characterize the original certificate in question in this case, which Baker, through his agent Steiner, caused to be located in Hill County in 1857 and deposited in the land office. The witness, Moreman avails himself of the opportunity afforded him by leading questions propounded, as is manifest in cross-examination (see Tr. 53), to say that he would not have been able to remember the date of the certificate, the person by whom it was issued, and the persons by whom it was attested, if the copy had not been attached to the interogatories furnished him, and that the last time he definitely remember to have seen the original of the copy was in the hands of Ferguson in 1850 or 1851. He thus seeks; without burdening his conscience with the express statement to that effect, to create an impression by implication that he absolutely recognized this copy in all its details as a copy of the original which he had, but such an implication is in conflict with the purport of his testimony elsewhere, and a proper analysis adds no strength to it. Why was it necessary that he should return personally to Kentucky to have a defect corrected in the certificate of acknowledgment? He himself shows that there were mails in those days? Who is Ferguson to whom he refers? Are we to infer that his trusted friend Ferguson purloined and sold this certificate to Baker, or that the latter purloined it, all by virtue of this conjectural testimony of Moreman, conflicting, if it have any weight, with the express and direct statement of the plaintiff's witness Van Horn.

The remarks of counsel for defendants in error to be found on pages 14, 15, 16 and 17 of their brief, connecting Baker with the forgery of this transfer, can be regarded by us as but in the nature of refinement. The conclusion is drawn, on page 16, that the transfer could not have been executed as it was with the original instrument in the possession of Baker, or of the grantor in that instrument. If the instrument was sufficiently described in the transfer to identify it, we fail to see what more could be required. Where was the necessity to describe it by number or by the day of the month of its issuance, when it was otherwise sufficiently identified for all the purposes of the transfer. It is inferred that Baker used the return number 11 made to the general land office (though the plaintiffs who used this return fail to show when it was filed in the land office), and also that he used the return of the traveling board, dated June 25, 1841, and accommodated his act to the name of J. H. Chism, as set out in the former report, and to the name J. H. Chisholm, as set out in the second; and it is also inferred that there was no other data accessible to him by which to fix the identity of J. H. Chism, and yet counsel elsewhere emphasize the fact that there were data then in the comptroller's office and in the land office, and in the public archives of these offices, which showed that J. H. Chism entitled to this certificate spelled his name in the latter way. If Baker could have access to the reports referred to, why could he not have access ta the last named data? Indeed, it appears from the report of the traveling board set out on page 17 of briefs for plaintiffs in error, as also in our brief, that this board knew that No. 701 used by it was not the true number of this certificate, whence it is to be inferred that they did know the true No. 990. If they had knowledge of this fact, why would not Baker, accredited with so much astuteness, have been possessed of the same information? The fact that the land was located in 1847 and not beforə that date, which, however, was in ample time to secure a part of the public domain as rich as any in the state, is easily explained by Baker, who shows that this certificate, with the original of the tranfer, was sent in the first instance to De Cordova, and by the latter returned to him, when he furnished it to Steiner; by whom it was located and the patent secured.

The correspondence between Steiner and Baker in 1857, the genuineness of which is not questioned, affirms beyond the peradventure of a doubt the correctness of Baker's statement that he had possession of this original certificate before it was located. The theory of the plaintiffs is necessarily that Baker obtained this certificate from Ferguson. If so, what was to prevent him from accomplishing a forgery fully describing the instrument in every detail? The entire, and we submit, undue, stress is laid upon the distinction between "J. H. Chism" and "J. H. Chisholm." It should be remembered that in the latter name the genuineness of this certificate was approved by the traveling board, without which no patent even could have been issued for the land in controversy. The registration of the transfer by Baker in Harris county before he sent it to De Cordova was an act most natural, and in the exercise of precaution against the consequence of loss. As the certificate had not then been located, there was no place where it could be more properly recorded than in Harris county, where the transaction occurred. But failure to file the transfer in the land office, which was not required, however, by law, finds a ready explanation in the evidence that the original was lost.

The charges asked by the defendants should not have been refused merely because they called the attention of the jury to the facts in evidence, or because even they may have been upon the weight of evidence, provided the testimony suggested the propriety of specifying these facts, which we submit was the case under the evidence in this record. We do not understand the rule to be that a federal judge, though forbidden to assume the existence of a controverted fact is precluded from referring to the facts in evidence or from expressing his opinion as to the weight thereof, if the record otherwise justifies this conduct. In connection with page 35 of our original Brief, and the statement of Mrs. Boling there found, we refer to page 24 of the transcript, and also to page 25, where this witness states, "He (J. H. Chism) returned about one year previous to his death, on account of bad health," and to page 25 of the transcript, where it appears he died December 3, 1839.

Adhering to the assignments of error set out in our original brief, we submit this case, with the earnest request that the judgment be reversed and the cause remanded.

E. H. GRAHAM,
Attorney for Jos. L. White, Plaintiff in Error.
TARLTON & MORROW,
Of counsel for Plaintiff in Error, J. L. White.